



San Francisco Law Library

No. 76667

Presented by

EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

United States
1117
Circuit Court of Appeals

For the Ninth Circuit.

CAROLINE J. ROBINSON,
Plaintiff in Error,
vs.

LORRIN A. THURSTON and JOHN D. PARIS,
Executors Under the Will of ELIZA ROY,
Deceased,
Defendants in Error,

Transcript of Record.


Upon Writ of Error to the Supreme Court of the
Territory of Hawaii.

Filed

SEP 24 1917

F. D. Monckton,

Clerk.



Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

United States
Circuit Court of Appeals
For the Ninth Circuit.

CAROLINE J. ROBINSON,
Plaintiff in Error,
vs.

LORRIN A. THURSTON and JOHN D. PARIS,
Executors Under the Will of ELIZA ROY,
Deceased,
Defendants in Error,

Transcript of Record.

Upon Writ of Error to the Supreme Court of the
Territory of Hawaii.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Amended Answer	32
Answer	31
Assignment of Error on Return to Writ of Error Returnable to United States Circuit Court of Appeals for the Ninth Circuit....	148
Assignment of Errors.....	5
Bond	8
Certificate of Clerk to Transcript of Record....	167
Citation on Writ of Error Returnable to U. S. Circuit Court of Appeals.....	158
Citation on Writ of Error Returnable to U. S. Circuit Court of Appeals.....	165
Complaint	15
Exception	54
Exceptions, Plaintiff's	51

EXHIBITS:

Exhibit "A" Attached to Complaint— Promissory Note Dated Honolulu, Sep- tember 23, 1884, W. F. Roy to Samuel C. Allen and Mark P. Robinson.....	22
Exhibit "B" Attached to Complaint— Promissory Note Dated Kona, Hawaii, July 31, 1886, Eliza Roy to John M. Robinson	23

Index.	Page
EXHIBITS—Continued:	
Exhibit "C" Attached to Complaint— Promissory Note Dated Honolulu, July 23, 1895, W. F. Roy and E. Roy to Henry Holmes.	24
Exhibit "D" Attached to Complaint— Agreement Dated November 27, Be- tween Caroline J. Robinson and Mrs. Eliza Roy	25
Plaintiff's Exhibit "A"—Batch of State- ments of Account, etc.....	95
Plaintiff's Exhibit "B"—Release, Dated November 27, 1905, Caroline J. Robin- son to Mrs. Eliza Roy.....	117
Judgment	52
Judgment	140
Minutes of the Clerk of the Circuit Court of the First Judicial Circuit, Territory of Hawaii	25
Minutes of the Clerk of the Supreme Court Un- der Dates of April 30 and June 15, 1917...	142
Notice of Issuance of Writ of Error.....	4
Opinion	121
Opinion and Decision.....	34
Order Allowing Writ of Error Returnable to U. S. Circuit Court of Appeals and Super- sedeas	146
Petition for Writ of Error.....	1
Petition for Writ of Error and Supersedeas Re- turnable to United States Circuit Court of Appeals for the Ninth Circuit.....	144

Index. Page

Praecipe for Transcript of Record on Writ of Error Returnable to U. S. Circuit Court of Appeals	160
Rule 4 of the Rules of the Circuit Court, First Circuit, Territory of Hawaii.....	143
Summons	11
Supersedeas and Cost Bond on Writ of Error Returnable to U. S. Circuit Court of Appeals	154
Term of Summons.....	28
TESTIMONY ON BEHALF OF PLAINTIFF:	
WHITE, THOMAS C.....	104
Cross-examination	110
Redirect Examination	114
TESTIMONY ON BEHALF OF DEFENDANTS:	
ALOI, JAMES K.....	80
PARIS, JOHN D.....	86
Cross-examination	89
ROBINSON, CAROLINE J.....	69
Cross-examination	77
Writ of Error to the Supreme Court of the Territory of Hawaii.....	156
Writ of Error to the Supreme Court of the Territory of Hawaii.....	163

In the Supreme Court of the Territory of Hawaii.

(Stamped \$2.00.)

CAROLINE J. ROBINSON,

Plaintiff,

vs.

LORRIN A. THURSTON and JOHN D. PARIS,
Executors Under the Will of ELIZA ROY,
Deceased,

Defendants.

Petition for Writ of Error.

To the Supreme Court of the Territory of Hawaii:

The petition of Caroline J. Robinson, plaintiff in error herein, respectfully shows that on or before the tenth day of July, 1916, in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, after a trial, jury waived, before the Honorable Clarence W. Ashford, First Judge of the Circuit Court of the First Judicial Circuit, a decision was rendered in favor of the defendants in a cause of Caroline J. Robinson, Plaintiff, vs. Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased, Defendants; that pursuant to the decision rendered as aforesaid, judgment in favor of the said defendants was, on the 18th day of July, 1916, duly entered in the said Circuit Court of the First Judicial Circuit of the Territory of Hawaii; that during the course of the trial of the said cause certain rulings and errors of law were made by the said Circuit Court against the said

plaintiff, to which said rulings counsel for said plaintiff duly excepted. [1*]

That said plaintiff deems herself aggrieved by the decision of the said First Judge of the Circuit Court of the First Judicial Circuit, rendered as aforesaid, by the rulings and judgment rendered by the said Circuit Court and by other errors of law then and there had, all of which more particularly appear in the assignment of errors herein and filed herewith.

That execution on the said judgment has not at this date been duly satisfied, and six months have not yet elapsed since the rendition of the said judgment.

WHEREFORE your petitioner, the plaintiff in error herein, respectfully prays that a writ of error issue out of and under the seal of this Court directed to the Clerk of the said Circuit Court of the First Judicial Circuit of the Territory of Hawaii, commanding him, the said Clerk, to send and duly certify to this Court, all records, pleadings, commissions, demurrers, exhibits, files, affidavits, minutes, judgment, transcripts of testimony and proceedings taken and filed in the said cause to the end that this Court may view the same and correct any and all errors, if any there be, therein.

Dated, Honolulu, T. H., January 9th, 1917.

CAROLINE J. ROBINSON,

Petitioner.

By HOLMES and OLSON and

PAUL R. BARTLETT,

Her Attorneys. [2]

*Page-number appearing at foot of page of original certified Transcript of Record.

Territory of Hawaii,
City and County of Honolulu,—ss.

Personally appeared Paul R. Bartlett, who, being duly sworn, deposes and says: That he is one of the attorneys for the above-named plaintiff in error; that he has read the foregoing petition, knows the contents thereof and that the allegations therein are true.

PAUL R. BARTLETT.

Subscribed and sworn to before me this 9th day of January, 1917.

[Notarial Seal] FLORENCE LEE,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

[Endorsed]: No. 993. In the Supreme Court of the Territory of Hawaii. Caroline J. Robinson, Plaintiff, vs. Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased, Defendants. Petition for Writ of Error. Holmes & Olson, 863 Kaahumanu St., Honolulu, Attorneys for Plaintiff. Filed January 9, 1917 at 3:25 P. M. J. A. Thompson, Clerk. [3]

In the Supreme Court of the Territory of Hawaii.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

CAROLINE J. ROBINSON,

Plaintiff in Error,

vs.

LORRIN A. THURSTON and JOHN D. PARIS,

Executors Under the Will of ELIZA ROY,

Deceased,

Defendants in Error.

Notice of Issuance of Writ of Error.

To Lorrin A. Thurston and John D. Paris, Executors

Under the Will of Eliza Roy, Deceased:

YOU WILL PLEASE TAKE NOTICE that a writ of error in the above-entitled cause has been issued by the Clerk of the Supreme Court of the Territory of Hawaii on this ninth day of January, 1917, on the application of the above-named plaintiff in error for the removal of the record, proceedings and judgment in the original cause from the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, to the Supreme Court of the Territory of Hawaii, and that a true and correct copy of the assignment of errors filed at the time of procuring said writ of error is hereto attached and herewith served upon you, which cause is still pending.

By HOLMES and OLSON and

PAUL R. BARTLETT,

Attorneys for Caroline J. Robinson, Plaintiff in Error.

We hereby accept service of the foregoing notice of issuance of writ of error and copy of assignment of errors dated this ninth day of January, 1917.

ANDREWS & PITTMAN,
Attorneys for Lorrin A. Thurston and John D. Paris,
Executors Under the Will of Eliza Roy, De-
ceased. [4]

In the Supreme Court of the Territory of Hawaii.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

CAROLINE J. ROBINSON,

Plaintiff in Error,

vs.

LORRIN A. THURSTON and JOHN D. PARIS,
Executors Under the Will of ELIZA ROY,
Deceased,

Defendants in Error.

Assignment of Errors.

Now comes Caroline J. Robinson, plaintiff in error herein, by her attorneys, Holmes & Olson and Paul R. Bartlett, Esquire, and says that in the record and proceedings in a cause lately pending in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, entitled "Caroline J. Robinson, Plaintiff, vs. Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased, Defendants," there are divers and manifest errors, and that the said plaintiff now makes and presents the following assignment of errors upon which she relies before this Court for relief as follows:

1. That said Circuit Court erred in making and entering judgment in said cause in favor of the defendants therein and against the plaintiff.

2. That said Circuit Court erred in rendering judgment in said cause in favor of the defendants, Lorrin A. Thurston and John D. Paris, executors under the will of Eliza Roy, deceased, and in adjudging that plaintiff take nothing by [5] her writ, and that the said defendants Lorrin A. Thurston and John D. Paris, executors under the will of Eliza Roy, deceased, recover from the plaintiff their costs of suit in the sum of Four Hundred Eighty-one Dollars and Fifty-five Cents (\$481.55).

3. That the said Circuit Court erred in not rendering judgment in the said cause in favor of the plaintiff.

4. That said Circuit Court erred in holding that certain conveyances made by Eliza Roy to William F. Roy did not constitute a breach of the agreement set forth in the bill of complaint in said cause, said agreement having been entered into between Eliza Roy and Caroline J. Robinson, plaintiff in error herein.

5. That said Circuit Court erred in not holding that said conveyances made by Eliza Roy to William F. Roy did constitute a breach of the agreement entered into by the said Eliza Roy and Caroline J. Robinson, plaintiff in error herein.

6. That the said Circuit Court erred in finding that by assent and ratification, plaintiff in error herein, excluded herself from the right to set up said conveyances by Eliza Roy to William F. Roy as a

breach of the agreement between Eliza Roy and Caroline J. Robinson.

7. That the said Circuit Court erred in finding that by reason of such alleged assent and ratification, plaintiff in error herein was debarred from resorting to the enforcement of the payment of the promissory notes as in the bill of complaint set forth. [6]

8. That the said Circuit Court erred in holding that the indebtedness contracted by Eliza Roy in violation of the terms and conditions of the agreement entered into by Eliza Roy and plaintiff in error did not make the indebtedness and interest thereon, specifically enumerated in said agreement, immediately become due and payable by Eliza Roy, her heirs, executors, administrators and assigns, to plaintiff in error.

9. That the said Circuit Court erred in not holding that the indebtedness contracted by Eliza Roy in violation of the terms and conditions of the agreement entered into by Eliza Roy and plaintiff in error made the indebtedness and interest thereon, specifically enumerated in said agreement, immediately become due and payable by Eliza Roy, her heirs, executors, administrators and assigns, to the plaintiff in error.

WHEREFORE the said plaintiff in error respectfully prays that the decision and judgment rendered and entered in the cause aforesaid, on account of the manifest errors aforesaid, be reversed, vacated and set aside, and that the said cause be remanded to the Circuit Court of the First Judicial Circuit for such

disposition as may be just and proper in the premises.

Dated, Honolulu, T. H., January 9th, 1917.

CAROLINE J. ROBINSON,

Plaintiff in Error.

By HOLMES and OLSON and

PAUL R. BARTLETT,

Her Attorneys.

[Endorsed]: No. 993. In the Supreme Court of the Territory of Hawaii. Caroline J. Robinson, Plaintiff in Error, vs. Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased, Defendants in Error. Notice of Issuance of Writ of Error and Assignment of Errors. Filed January 9, 1917, at 3:25 P. M. J. A. Thompson, Clerk. Holmes & Olson, 863 Kaahumanu St., Honolulu, Attorneys for Pltf. in Error. [7]

In the Supreme Court of the Territory of Hawaii.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

\$1.00 Stamp.

CAROLINE J. ROBINSON,

Plaintiff in Error,

vs.

LORRIN A. THURSTON and JOHN D. PARIS,

Executors Under the Will of ELIZA ROY,

Deceased,

Defendants in Error.

Bond.

KNOW ALL MEN BY THESE PRESENTS:
That Caroline J. Robinson, as principal, and the

Fidelity and Deposit Company of Maryland, as surety, are bound and firmly held unto Lorrin A. Thurston and John D. Paris, executors under the will of Eliza Roy, deceased, in the penal sum of four Hundred Eighty-one Dollars and Fifty-five Cents (\$481.55) with interest thereon at the rate of six per cent (6%) per annum from the eighteenth day of July, 1916, for the payment of which, well and truly to be made, they do bind themselves, and their respective heirs, executors, administrators successors and assigns, jointly, severally and firmly, by these presents.

Signed with their names and sealed with their seals on this ninth day of January, 1917.

THE CONDITION of the foregoing obligation is such that in the cause lately pending in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, wherein the obligees were defendants and the obligor was plaintiff, the said obligees on the eighteenth day of July, [8] 1916, obtained judgment against the said obligor in the sum of Four Hundred Eighty-one Dollars and Fifty-five Cents (\$481.55), with interest thereon at the rate of six per cent (6%) per annum from the said eighteenth day of July, 1916, and the said obligor has sought to obtain a writ of error in the said cause in the Supreme Court of the Territory of Hawaii, and that the said obligor has undertaken to pay the said judgment in the said cause, together with interest thereon, in case of failure to sustain the said writ of error.

NOW, THEREFORE, if the said obligor shall fail to sustain the said writ of error and shall fail to pay the said judgment in the said cause, together with interest thereon, then this obligation shall be of full force and effect; otherwise null and void.

CAROLINE J. ROBINSON,

Principal.

FIDELITY AND DEPOSIT COMPANY OF
MARYLAND,

Surety.

By ARTHUR BERG,

Attorney in Fact.

JAMES M. MACCONEL,

Agent.

Approved as to form, sufficiency and amount.

ANDREWS & PITTMAN,

Atty. for Deft.

[Endorsed]: #465. No. 993. In the Supreme Court of the Territory of Hawaii. Caroline J. Robinson, Plaintiff in Error, vs. Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased, Defendants in Error. Bond. Filed January 9, 1917, at 3:25 P. M. J. A. Thompson, Clerk. [9]

In the Supreme Court of the Territory of Hawaii.

(\$2.00 Stamps.)

CAROLINE J. ROBINSON,

Plaintiff in Error,

vs.

LORRIN A. THURSTON and JOHN D. PARIS,

Executors Under the Will of ELIZA ROY,

Deceased,

Defendants in Error.

Summons.

The Territory of Hawaii: To the High Sheriff of the Territory of Hawaii, or his Deputy; the Sheriff of the County of Hawaii or his Deputy:

YOU ARE COMMANDED to summon Lorrin A. Thurston and John D. Paris, executors under the will of Eliza Roy, deceased, defendants-defendants in error, to appear before the Supreme Court of the Territory of Hawaii within twenty (20) days after service hereof, to answer the annexed petition for writ of error and assignment of errors of Caroline J. Robinson, plaintiff-plaintiff in error. And have you then there this Writ with full return of your doings thereon.

WITNESS the Honorable Chief Justice of the Supreme Court of the Territory of Hawaii, at Honolulu, City and County of Honolulu, this 9th day of January, 1917.

[Seal]

J. A. THOMPSON,

Clerk. [10]

No. 993. Supreme Court, Territory of Hawaii, Caroline J. Robinson v. Lorrin A. Thurston and John D. Paris, Executors under the Will of Eliza Roy, Deceased. Summons. Issued at 3:45 o'clock P. M., January 9, 1917. J. A. Thompson, Clerk. Received at 10:45 P. M. Jan. 10, A. D. 1917. P. Gleason, Deputy High Sheriff. Ent. Returned at 1:45 o'clock P. M., January 29, 1917. J. A. Thompson, Clerk.

RETURN OF SERVICE.

Served the within Summons as follows:

On D. Paris, at Kaawaloa, District of ~~Kau~~, S. Kona County and Territory of Hawaii, this 25 day of January, A. D. 1917, by delivering to him personally a certified copy thereof and of the Petition for Writ of Error, Notice of Issuance of Writ of Error and Assignment of Errors annexed hereto, and at the same time showing him the original as directed.

Dated, Kau, Hawaii, this 25 day of January, A. D. 1917.

S. LAZARO,

Deputy Sheriff, South Kona.

RETURN OF SERVICE.

Served the within Summons as follows:

On Lorrin A. Thurston, at Volcano House, District of Kau, County and Territory of Hawaii, this 17th day of January, A. D. 1917, by delivering to him personally a certified copy thereof and of the petition for Writ of Error, Notice of Issuance of Writ of Error and Assignment of Errors annexed hereto, and at the same time showing him the original as directed.

Dated Hilo, Hawaii, this 7th day of January, A. D.
1917.

H. K. MARTIN,
Deputy Sheriff, County of Hawaii. [11]

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1916.

(\$2.00 Stamps.)

CAROLINE J. ROBINSON,
Plaintiff in Error,
vs.

LORRIN A. THURSTON and JOHN D. PARIS,
Executors Under the Will of ELIZA ROY,
Deceased,
Defendants in Error.

Writ of Error.

The Territory of Hawaii: To Harry A. Wilder Esquire, Clerk Circuit Court, First Judicial Circuit.

WHEREAS, in an action lately pending before the Circuit Court of the First Judicial Circuit, in which the said Caroline J. Robinson was plaintiff, and the said Lorrin A. Thurston and John D. Paris, executors under the will of Eliza Roy, deceased, were defendants, error is alleged to have occurred as appears by the assignment of errors on file in this Court, you are commanded forthwith to send up to this Court the record and the exhibits filed in said proceedings.

WITNESS, the Hon. A. G. M. ROBERTSON,
Chief Justice of the Supreme Court, at Honolulu,
Territory of Hawaii, this 9th day of January, 1917.

By the Court:

[Seal]

J. A. THOMPSON,

Clerk Supreme Court.

Received the above writ of error on this 10th day
of January, 1917, at 9:00 o'clock A. M.

H. A. WILDER,

Clerk Circuit Court, First Circuit.

In obedience to the within writ to me directed, I
herewith send up the record and all the exhibits filed
in said above-mentioned cause.

H. A. WILDER,

Clerk Circuit Court, First Circuit.

Dated January 18, 1917. [12]

No. 993. Supreme Court, Territory of Hawaii.
Caroline J. Robinson, Plaintiff in Error, v. Lorrin
A. Thurston and John D. Paris, Executors Under the
Will of Eliza Roy, Deceased. Defendant in Error.
Writ of Error. Issued at 3:45 o'clock P. M. Jan'y
9, 1917. J. A. Thompson, Clerk. Returned at 2:50
o'clock P. M. Jan. 19, 1917. Robert Parker, Jr.,
Clerk.

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

Stamps \$2.00.

CAROLINE J. ROBINSON,

Plaintiff,

vs.

LORRIN A. THURSTON and JOHN D. PARIS,
Executors Under the Will of ELIZA ROY,
Defendants.

Complaint.

To the Honorable Presiding Judge of the Circuit
Court of the First Judicial Circuit, Territory
of Hawaii:

Comes now Caroline J. Robinson, residing in the
City and County of Honolulu, Territory of Hawaii,
the plaintiff in the above-entitled cause, and com-
plains of Lorrin A. Thurston, residing at said Holo-
lulu, and John D. Paris, residing at Kealakekua,
county and territory of Hawaii, the executors under
the will of Eliza Roy, deceased, the defendants in
the above-entitled cause, and for causes of action
alleges:

FIRST COUNT.

(1) That one Eliza Roy, of Kona, said county and
territory of Hawaii, died on or about the 29th day
of August, 1912, leaving a last will and testament
which was duly admitted to probate in the Circuit
Court of the Third Circuit of the Territory of
Hawaii, and that the said defendants are the duly

appointed, qualified and [13] acting executors under said Will.

(2) That heretofore, on or about the 23d day of September, 1884, one W. F. Roy, since deceased, made and delivered to Samuel C. Allen and Mark P. Robinson, his certain promissory note in writing, dated September 23d, 1884, for the sum of Two Thousand Dollars (\$2,000.00), payable two years after the date of the said note, with interest thereon at the rate of ten per cent (10%) per annum until paid, payable semi-annually, a copy of which said promissory note, marked Exhibit "A," is hereto attached and made a part hereof; that thereafter said Eliza Roy, for valuable consideration, while the said promissory note still remained unpaid, promised and agreed with the holders of said promissory note to pay the same; that the said promissory note was duly assigned and transferred to the plaintiff herein and said plaintiff is now the owner and holder of said promissory note; that before the 23d day of March, 1889, the rate of interest of said promissory note was reduced from ten per cent (10%) to nine per cent (9%) per annum; that no part of the principal of said promissory note has been paid and no part of the interest thereon from the 23d day of March, 1889, has been paid, and the said principal and interest from the 23d day of March, 1889, has been paid, and the said principal and interest from the said 23d day of March, 1889, is now due and owing to the plaintiff.

(3) That heretofore, on or about the 31st day of July, 1886, the said Eliza Roy made and delivered

to one John N. Robinson her certain promissory note in writing, dated July 31st, 1886, for the sum of Three Thousand Seven Hundred and Fifty Dollars (\$3,750.00), payable three years after the date of said note, with interest thereon at the rate of nine per cent [14] (9%) per annum, payable semi-annually, a copy of which said promissory note, marked Exhibit "B," is hereto attached and made a part hereof; that thereafter the said promissory note was duly assigned and transferred to said plaintiff and said plaintiff is now the owner and holder thereof: that the principal of said promissory note is entirely unpaid, and that no part of the interest thereon has been paid, save and except the sum of One Thousand and Thirty Dollars and Thirty Cents (\$1,030.30), and that the same both principal and said interest, is now due and owing to the plaintiff and entirely unpaid.

(4) That heretofore, on or about the 23d day of July, 1895, the said W. F. Roy and Eliza Roy made and delivered to one Henry Holmes their certain promissory note in writing, dated July 23d, 1895, for the sum of One Hundred and Twenty-five Dollars (\$125.00), payable on demand, a copy of which said promissory note, marked Exhibit "C," is hereto attached and made a part hereof; that thereafter the said promissory note was duly assigned and transferred to said plaintiff and said plaintiff is now the owner and holder thereof; that the principal of said promissory note is entirely unpaid and no interest has been paid thereon and that the same, both prin-

cipal and interest, at the legal rate, is due and owing to the plaintiff and entirely unpaid.

(5) That on or before the 27th day of November, 1905, at which time the said plaintiff was the owner and holder of all of said promissory notes hereinbefore referred to, and after the said Eliza Roy had agreed to pay the promissory note hereinbefore referred to as Exhibit "A," as hereinbefore alleged, the said plaintiff and said Eliza Roy entered into and executed an [15] *an* agreement in writing, a copy of which, marked Exhibit "D," is hereto attached and made a part hereof, wherein and whereby the said Eliza Roy acknowledged her indebtedness to said plaintiff upon and in respect of each and every said promissory notes hereinbefore mentioned, and said plaintiff, in consideration of ten dollars (\$10.00), to her paid by said Eliza Roy and the covenants and agreements of Eliza Roy hereinafter mentioned, did release, cancel and discharge the said promissory notes upon the express condition that in case the said Eliza Roy should at any time thereafter mortgage or sell any of her real estate, or incur indebtedness amounting at any one time to the sum of One Thousand Dollars (\$1,000.00), and upwards, without the consent in writing of said plaintiff, then and in such case the said release, cancellation and discharge should become null and void and of no effect, and said promissory notes, together with the interest thereon, should immediately become due and payable by said Eliza Roy, her executors and administrators to said plaintiff in the same manner as though said release, cancellation and

discharge had not been made; that in consideration of said release, cancellation and discharge, said Eliza Roy, for herself and her executors and administrators, covenanted and agreed with said plaintiff that she, said Eliza Roy, would not, without the approval in writing of said plaintiff, sell or mortgage any of her lands, or incur any indebtedness in excess at any one time, of the sum of One Thousand Dollars (\$1,000.00), and did agree that in case of any such violation of said covenant and agreement or any part thereof, then and in such case the said promissory notes, together with interest thereon, should be and become immediately due and payable to said plaintiff, as if said release, cancellation and discharge had not been made; that thereafter, between the 31st day of [16] July, 1908, or thereabouts, and the 8th day of June, 1909, or thereabouts, both dates inclusive, the said Eliza Roy did sell and convey certain portions of her real estate without the consent of the said plaintiff, and did thereafter, without the consent of said plaintiff, incur indebtedness amounting in the aggregate, at one time, to more than One Thousand Dollars (\$1,000.00); that by the said sales and conveyances and the incurring of the said indebtedness, the said Eliza Roy did violate the condition of the said agreement and her said covenants and agreements therein contained, and by reason thereof the said promissory notes and each of them, together with the interest thereon, have become due and payable to the plaintiff and the same are now wholly due, owing and unpaid, save as hereinbefore alleged, to the said plaintiff;

(6) That on the 13th day of December, 1913, and within the period prescribed by law for the presentation of claims of creditors against the estate of said Eliza Roy, deceased, said plaintiff duly presented to said defendant as executors aforesaid, a duly authenticated claim under and in respect of the said promissory notes for the amounts due her thereunder, and that the same was rejected

(S) C. W. A.,

1st Judge,
June 1/16.

March

by said executors on the 4th day of April,
1914.

(7) That none of said promissory notes, either principal or interest, or any part thereof, have been paid, save and except interest paid as aforesaid, and the same are entirely due and owing and unpaid.
[17]

SECOND COUNT.

(1) Said plaintiff reiterates and realleges all of the averments contained in paragraphs (1), (2), (5) and (6) of the First Count of this complaint, and alleges further:

(2) That no part of the principal of the said promissory note, copy of which marked Exhibit "A" is hereto attached, has been paid and no part of the interest thereon from the 23d day of March, 1889, has been paid, and the same is now and owing to the plaintiff.

THIRD COUNT.

(1) That said plaintiff reiterates and realleges all of the averments contained in paragraphs (1), (3), (5) and (6) of the First Count of this complaint, and alleges further:

(2) That no part of the principal of the said promissory note, copy of which marked Exhibit "B" is hereto attached, has been paid, and that no part of the interest thereon has been paid, save and except the sum of \$1,030.30, paid on account of interest, and that the said principal and said interest, with the exception aforesaid, is now due and owing to the plaintiff.

FOURTH COUNT.

(1) The said plaintiff reiterates and realleges all of the averments contained in paragraphs (1), (4), (5) and (6) of the First Count of this complaint, and alleges further:

(2) That no part of the principal or interest of said promissory note, copy of which marked Exhibit "C" is hereto attached, has been paid, and the same is now due and owing to the plaintiff.

WHEREFORE plaintiff prays judgment against said defendants [18] in the sum of \$5,875.00, being the aggregate amount of the principal sums of said promissory notes, together with interest thereon as provided therein from the respective dates of said promissory notes, less the amounts paid on account of interest as aforesaid, and for costs and attorneys fees, and that the process of this court to issue to cite said defendants to answer this complaint before a jury of the country at the 1914 term of this court unless sooner disposed of by judicial authority.

Dated, Honolulu, March 30, 1914.

(S.) CAROLINE J. ROBINSON,

Plaintiff.

(S. HOLMES, STANLEY & OLSON,

Attorneys for Plaintiff.

Territory of Hawaii,
City and County of Honolulu,—ss.

Caroline J. Robinson, being first duly sworn, deposes and says that she is the plaintiff in the above-entitled cause; that she has read the foregoing complaint and knows the contents thereof and that the same are true.

(S.) CAROLINE J. ROBINSON.

Subscribed and sworn to before me this 30th day of March, 1914.

[Seal] (S.) FLORENCE LEE,
Notary Public, First Judicial Circuit, Territory of Hawaii. [19]

**Exhibit "A" Attached to Complaint—Promissory
Note Dated Honolulu, September 23, 1884, W.
F. Roy to Samuel C. Allen and Mark P.
Robinson.**

\$2000.00 Honolulu, Sept. 23d, 1884.

For value received two years after date I promise to pay to SAMUEL C. ALLEN and MARK P. ROBINSON, Trustees of the Estate of James Robinson, or order, the sum of TWO THOUSAND DOLLARS with interest at the rate of ten per cent (10%) per annum until paid, payable semi-annually.

W. F. ROY.

ENDORSEMENTS:

It is agreed that the Interest from March 23/1887 shall be at the rate of 9% per cent per annum.

M. P. ROBINSON,
For Trustees Est. Jas. Robinson.

\$100.00. Honoulu May 2, 1885. Received six months Intr. to March 23, 1885.

\$400.00. Honolulu, June 2, 1887. Received Twenty-Four months Intr. to March 23, 1887.

\$180.00. Honolulu, June 19, 1888. Received 12 mos. Intr. to March 23, 1888. One hundred and eighty dollars.

\$180.00 Honolulu, April 10th, 1889. Received 12 mos. Intr. to March 23, 1889. \$180.00 Dollr.

M. P. ROBINSON,

For Trustees Est. Jas. Robinson. [20]

**Exhibit "B" Attached to Complaint—Promissory
Note Dated Kona, Hawaii, July 31, 1886, Eliza
Roy to John N. Robinson.**

\$3750.00. Kona, Hawaii, July 31st, 1886.

For value received, three years after date I promise to pay to JOHN N. ROBINSON or order the sum of THREE THOUSAND SEVEN HUNDRED AND FIFTY DOLLARS, together with interest thereon payable semi-annually at the rate of nine per cent per annum free of taxes.

ELIZA ROY.

ENDORSEMENTS:

I hereby consent to this obligation hereby incurred by my wife.

W. F. ROY.

Hawaiian Islands,
Island of Hawaii,—ss.

On this 3d day of August, A. D. 1886, personally appeared before me W. F. Roy and Eliza, his wife, known to me to be the persons described in and who

executed the foregoing instrument, who acknowledged to me that they executed the same freely and voluntarily and for the uses and purposes therein set forth. The said Eliza being by me duly examined separate and apart from her husband declared to me that she executed the within instrument of her own free will and accord and without compulsion or fear of her husband.

J. W. SMITH,

Agent to Take Acknowledgments of Instruments
Kona, Hawaii.

1888, June 19. Recd. Int. 2 years to July 31, 1888.
\$675.

1888, June 19. Recd. Int. on a/c \$55.30.

1889, Aug. 19. Recd. Int. on a/c \$300. [21]

**Exhibit "C" Attached to Complaint—Promissory
Note Dated Honolulu, July 23, 1895, W. F. Roy
and E. Roy to Henry Holmes.**

\$125.00 Honolulu, July 23d, 1895.

On demand after I date, I promise to pay to the order of HENRY HOLMES, ONE HUNDRED AND FIFTY FIVE /00 DOLLARS, in U. S. Gold Coin at the Bank of Bishop & Co.

Value received.

W. F. ROY and E. ROY.

ENDORSEMENT:

Pay to Mrs. Caroline J. Robinson or order without recourse.

HENRY HOLMES. [22]

**Exhibit "D" Attached to Complaint — Release
Dated November 27, Between Caroline J.
Robinson and Mrs. Eliza Roy.**

THIS AGREEMENT made this twenty-seventh day of November by and between CAROLINE J. ROBINSON of Honolulu, Territory of Hawaii, and MRS. ELIZA ROY, widow of W. F. Roy of Kona, Island of Hawaii,

WITNESSETH:

WHEREAS the said Eliza Roy is indebted to the said Caroline J. Robinson in the following sums:

- 1.—On Promissory Note of W. F. Roy and Eliza Roy dated July 23, 1895, with interest at the rate of 8% per annum \$125.00
Amount of interest to date..... 103.33
- 2.—On Promissory Note signed by W. F. Roy dated Sept. 23, 1884, and assumed by said Eliza Roy, with interest at the rate of 9% per annum from March 23, 1889..... 2000.00
Amount of interest to date..... 3000.00
The same being secured by mortgage of real estate dated Sept. 23, 1884, and recorded in the Registry of Deeds in Honolulu, in Book 91 on pages 411-413.
- 3.—On Note of Eliza Roy dated July 31, 1886, with interest at the rate of 9% per annum from July 31, 1889, the same being secured by mortgage of real estate dated July 31, 1886, re-

corded in the Registry of Deeds in said Honolulu in Book 99, on pages 488-489	3750.00
Amount of interest to date.....	5512.50

Total amount of principal and inter-
est as of November 23, 1905.....\$14490.83

AND WHEREAS the said Caroline J. Robinson has agreed to cancel and release the said indebtedness and the said notes and mortgages and to release the said Eliza Roy from said indebtedness and all claim under said notes and mortgages on the terms and conditions hereinafter contained; and the said Eliza Roy has agreed to said terms and conditions;

NOW THEREFORE in consideration of the premises and of the sum of Ten Dollars (\$10) to the said Caroline J. Robinson paid by the said Eliza Roy, the receipt whereof by the said Caroline J. Robinson is hereby acknowledged and in further consideration of the covenants and agreements of the said Eliza Roy hereinafter contained the said Caroline J. Robinson doth hereby acknowledge [23] full payment and settlement of said indebtedness, principal and interest, hereinabove set forth and doth hereby release the same and cancel and discharge the said notes and mortgages;

PROVIDED, HOWEVER, that if the said Eliza Roy shall at any time hereafter mortgage or sell any of her real estate or shall incur indebtedness amounting at any one time to the sum of One Thousand Dollars (\$1,000) and upwards without the consent in writing of the said Caroline J. Robinson, then

and in any such case this acknowledgment of payment of said indebtedness and said release and cancellation and discharge of said notes and mortgages shall be null and void and of no effect and said enumerated indebtedness and interest thereon shall immediately become due and payable by the said Eliza Roy, her heirs, executors, administrators and assigns to the said Caroline J. Robinson, her heirs, executors, administrators and assigns with interest thereon at the several rates aforesaid, in the same manner as though this acknowledgement of payment and release of said notes and mortgages had not been made.

The said Eliza Roy in consideration of the foregoing agreements on the part of said Eliza Roy, for herself, her heirs, executors, administrators and assigns doth hereby covenant and agree with the said Caroline J. Robinson, her heirs, executors, administrators and assigns that she will not, without the approval in writing of the said Caroline J. Robinson, sell or mortgage any of her lands or incur any indebtedness in excess, at any one time, of the sum of One Thousand Dollars (\$1,000).

And the said Eliza Roy doth hereby acknowledge that the said enumerated indebtedness and interest thereon as hereinabove set forth are now due and payable to the said Caroline J. Robinson and doth hereby agree that in case of the violation by her of her said above agreement and covenant, or any part thereof, then and in such case the said indebtedness, principal and interest shall be and become immediately due and payable to the said Caroline J. Rob-

inson, her heirs, executors, administrators and assigns, in the same manner as though this acknowledgement of payment and release has not been made.

IN WITNESS WHEREOF the said parties hereto have hereunto set their hands and seals the day and year first above written.

(Sgd.) CAROLINE J. ROBINSON.

her

ELIZA ROY. X

mark

Witness:

(Sgd.) L. A. THURSTON.

[Endorsed]: Filed Mar. 30, 1914 at 4:25 a'clock
P. M. (S.) J. A. Dominis, Clerk. [24]

*In the Circuit Court of the First Circuit, Territory
of Hawaii.*

A. D. 1914 TERM.

(Stamps \$2.00.)

CAROLINE J. ROBINSON,

Plaintiff,

vs.

LORRIN A. THURSTON and JOHN D. PARIS,
Executors Under the Will of ELIZA ROY,
Deceased,

Defendants.

Term Summons.

The Territory of Hawaii: To the High Sheriff of the Territory of Hawaii, or his Deputy; the Sheriff of the City and County of Honolulu, or his Deputy, or any Police Officer:

YOU ARE COMMANDED to summon LORRIN A. THURSTON and JOHN D. PARIS, Executors under the Will of Eliza Roy, deceased, defendants, in case they shall file written answer within twenty days after service hereof to be and appear before the said Circuit Court at the term thereof pending immediately after the expiration of twenty days after service hereof; provided, however, if no term be pending at such time, then to be and appear before the said Circuit Court at the next term thereof, to wit, the A. D. 1915, Term thereof, to be holden at Honolulu, City and County of Honolulu, on Monday the 11th day of January next, at 10 o'clock A. M., to show cause why the claim of the above named plaintiff should not be awarded to her pursuant to the tenor of her annexed Complaint.

And have you then there this Writ with full return of your proceedings thereon.

WITNESS the Honorable Presiding Judge of the Circuit Court of the First Circuit at Honolulu aforesaid, this 30th day of March, 1914.

[Seal]

(S) J. A. DOMINIS,

Clerk.

L. No. 7950. Reg. 4, p. 416. Circuit Court, First Circuit. Caroline J. Robinson, Plaintiff, vs. Lorrin A. Thurston and John D. Paris, Executors Under

the Will of Eliza Roy, Deceased, Defendants.
Term Summons. Issued at 4:25 o'clock P. M. Mar.
30th, 1914. (S.) J. A. Dominis, Clerk. Returned
at 1:25 o'clock P. M. April 6th, 1914. (S.) J. A.
Dominis, Clerk. [25]

Territory of Hawaii,
County of Hawaii,—ss.

I, Manase K. Makekau, Deputy High Sheriff of
the Territory of Hawaii, do hereby certify and make
return that I served the within Summons, Com-
plaint and Exhibits "A," "B," "C," and "D" as
follows:

On John D. Paris, executor under the will of
Eliza Roy, deceased, therein named as defendant, at
Kealakekua, South Kona, County and Territory of
Hawaii, this 1st day of April, A. D. 1914;

On Lorrin A. Thurston, executor under the will of
Eliza Roy, deceased, therein named as defendant, at
Waiakea, Hilo County and Territory of Hawaii, this
2d day of April, A. D. 1914;

By delivering to each of them a certified copy
hereof and of the Complaint and Exhibits "A,"
"B," "C" and "D," annexed hereto, and at the same
time showing each of them the original as herein di-
rected.

Dated Hilo, County of Hawaii, April 2d, 1914.

(S.) M. K. MAKEKAU,
Deputy High Sheriff, Territory of Hawaii. [26]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

CAROLINE J. ROBINSON,

Plaintiff,

vs.

LORRIN A. THURSTON, and JOHN D. PARIS,
Executors Under the Will of ELIZA ROY,
Deceased,

Defendants.

Answer.

Now come the defendants, by their attorney, Lorrin Andrews, and, answering the complaint of the plaintiff herein, deny each and every allegation in said complaint contained.

And, further, defendants give notice that, among other defenses, they will rely upon the defense of payment, the statutes of frauds and the statute of limitations.

(S.) LORRIN ANDREWS,
Attorney for Defendants.

Dated Honolulu, T. H., April 27, 1914.

[Endorsed]: L. No. 7950. Reg. 4, pg. 416. Circuit Court, First Circuit, Territory of Hawaii. Caroline J. Robinson, Plaintiff, vs. Lorrin A. Thurston et al., as Executors, etc., Defendants. Answer. Filed April 27, 1914, at 40 minutes past 10 o'clock A. M. (S.) J. A. Dominis, Clerk. Lorrin Andrews, Honolulu, T. H., Attorney for Defendants.

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

CAROLINE J. ROBINSON,

Plaintiff,

vs.

LORRIN A. THURSTON, and JOHN D. PARIS,
Executors Under the Will of ELIZA ROY,
Deceased,

Defendants.

Amended Answer.

Now come the defendants, by their attorney, Lor-
rin Andrews, and answering the complaint of the
plaintiff herein, admit paragraphs 1, 2, 3 and 4 of
the First, ~~Second and Third~~ Counts in said
complaint contained, and deny each and <sup>(S) C. W. A.,
1st Judge,
June 1/16.</sup> every other allegation in said complaint
contained, and further answering said complaint,
allege that any and all claims now held by the said
plaintiff against the said Eliza Roy were fully paid
and settled by the agreement dated the 28th day of
November, 1905, attached to said complaint and
marked Exhibit "D," and further set up that more
than six years have elapsed since said notes and in-
debtedness now held by said plaintiff became due
and payable, ~~and more than ten years have~~
~~elapsed since said mortgages set forth in said~~ <sup>(S) C. W. A.,
1st Judge,
June 1/16.</sup> ~~complaint became due and payable,~~ and that
all of said claims set forth in said complaint are now
barred by the statutes of the Territory of Hawaii in
regard to the limitation of actions. [28]

WHEREFORE, defendants demand judgment that plaintiff's complaint be dismissed, with costs.

Dated, Honolulu, T. H., May 24, 1916.

Attorney for Defendants.

[Endorsed]: L. No. 7950. Reg. 5, pg. 416. L. No. 7950. Circuit Court, First Circuit, Territory of Hawaii. Caroline J. Robinson, Plaintiff, vs. Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased, Defendants. Amended Answer. Filed May 24th, 1916, at — minutes past 3 o'clock P. M. (S.) J. A. Dominis, Clerk. Lorrin Andrews, Honolulu, T. H., Attorney for Defendants.

Plaintiff herein hereby consents to the filing of the within Answer.

CAROLINE J. ROBINSON,
Plaintiff,
By (S.) HOLMES & OLSON,
Her Attorneys. [29]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

CAROLINE J. ROBINSON,
Plaintiff,

vs.

LORRIN A. THURSTON, and JOHN D. PARIS,
Executors Under the Will of ELIZA ROY,
Deceased,
Defendants.

Opinion and Decision.

The declaration herein alleges in substance as follows: That the defendants are the regularly appointed, qualified and acting executors of the last will and testament of Eliza Roy, deceased, formerly of Kona, in the Island of Hawaii. That about September, 1884, one W. F. Roy, since deceased (then the husband of said Eliza Roy), executed to the trustees of the estate of James Robinson, his promissory note for \$2,000.00, payable two years after its date, with interest at ten per cent (10%) per annum until paid, and payable semi-annually, and that thereafter, said Eliza Roy, for a valuable consideration, assumed the payment of said note. That said promissory note has been duly assigned to, and is now owned by the plaintiff herein, and that the entire principal of said note, together with interest (which in the interval had been reduced to nine (9%) per cent per annum), from March 23d, 1889, is now due and payable. That on or about July 31st, 1886, said Eliza Roy executed her promissory note for \$3,750.00 to John N. Robinson, [30] payable three years after said date, with interest at nine (9%) per cent per annum, payable semi-annually; that plaintiff has since acquired and now owns said note, and that the entire principal thereby represented, together with interest at said rate, is now due and owing, except as to the sum of \$1,030.30, which has been paid on account of interest thereon. That on or about July 23d, 1895, said W. F. Roy and Eliza Roy, executed to Henry Holmes, their promissory

note in the sum of \$125.00, payable on demand, which said note has since been acquired and is now owned by plaintiff, and has not been paid. There is no allegation of any demand for the payment of this note having been made upon either of its makers, except as such demand may possibly be implied from a certain agreement between plaintiff and said Eliza Roy, hereinafter referred to.

The agreement just mentioned is alleged to have been executed November 27th, 1905, and is of such peculiar character as to call for the recital *in haec verba*, of the greater part of its contents. After reciting an indebtedness by Eliza Roy to the plaintiff, in respect of the promissory notes above mentioned, to an aggregate of \$14,490.83,—said agreement proceeds as follows:

“AND WHEREAS, the said Caroline J. Robinson has agreed to cancel and release the said indebtedness and the said notes and mortgages and to release the said Eliza Roy from said indebtedness and all claim under said notes and mortgages on the terms and conditions hereinafter contained; and the said Eliza Roy has agreed to said terms and conditions;

“NOW, THEREFORE, in consideration of the premises and of the sum of Ten Dollars (\$10) to the said Caroline J. Robinson paid by the said Eliza Roy, the receipt whereof by the said Caroline J. Robinson is hereby acknowledged, and in further consideration of the covenants and agreements of the said Eliza Roy hereinafter contained the said Caroline J. Rob-

inson doth hereby acknowledge full payment and settlement of said indebtedness, principal and interest, hereinabove set forth and doth hereby release the same and cancel and discharge the said notes and mortgages;

“PROVIDED, HOWEVER, that if the said Eliza Roy shall at any time hereafter mortgage or sell any of her real estate or shall incur indebtedness amounting at any one time to the sum of One Thousand Dollars (\$1,000) and upwards, without the consent in writing of the said Caroline J. Robinson, then and in any such case this acknowledgment of payment of said indebtedness [31] and said release and cancellation and discharge of said notes and mortgages shall be null and void and of no effect and said enumerated indebtedness and interest thereon shall immediately become due and payable by the said Eliza Roy, her heirs, executors, administrators and assigns to the said Caroline J. Robinson, her heirs, executors, administrators and assigns with interest thereon at the several rates aforesaid, in the same manner as though this acknowledgment of payment and release of said notes and mortgages had not been made.

“The said Eliza Roy in consideration of the foregoing agreements on the part of said Eliza Roy, for herself, her heirs, executors, administrators and assigns doth hereby covenant and agree with the said Caroline J. Robinson, her heirs, executors, administrators and assigns that she will not, without the approval in writing of

the said Caroline J. Robinson, sell or mortgage any of her lands or incur any indebtedness in excess, at any one time, of the sum of One Thousand Dollars (\$1,000).

“And the said Eliza Roy doth hereby acknowledge that the said enumerated indebtedness and interest thereon as hereinabove set forth are now due and payable to the said Caroline J. Robinson, and doth hereby agree that in case of the violation by her of her said above agreement and covenant, or any part thereof, then and in such case the said indebtedness, principal and interest shall be and become immediately due and payable to the said Caroline J. Robinson, her heirs, executors, administrators and assigns, in the same manner as though this acknowledgment of payment and release had not been made.”

There are other counts to the declaration, declaring upon said promissory notes separately. It is to be observed that there is no mention in the body of the declaration of any security having been given for the payment of said notes, or any of them; but in the agreement above referred to and quoted from, it is recited that the earliest of said promissory notes, that for \$2,000.00, executed by W. F. Roy to the trustees of the estate of James Robinson, was secured by mortgage of real estate, bearing even date therewith, which mortgage was duly recorded, etc.

The declaration further alleges that plaintiff made due presentation to the defendants, as such executors, of her claim in this behalf, within the time

limited by law, and that they having rejected the same, plaintiff filed this suit within the period permitted by law after such rejection. [32]

The amended answer of the defendants admits all of the allegations of the complaint which have to do with the execution, delivery, transfer, present ownership, and nonpayment (except as hereinafter noted), of the promissory notes in question, but denies all the other allegations thereof, and alleges "that any and all claims now held by the said plaintiff against the said Eliza Roy, were fully paid and settled by the agreement dated the 27th day of November, 1905, attached to said complaint and marked Exhibit "D," and further set up that more than six years have elapsed since said notes and the indebtedness now held by said plaintiff became due and payable, and that all of said claims set forth in said complaint are now barred by the statutes of the Territory of Hawaii in regard to the limitation of actions."

It is thus seen that all the substantial facts averred in the declaration are admitted, but the amended answer denies the effect, or legal conclusions claimed for those facts, as attempted to be established in behalf of plaintiff by virtue of the agreement of November 27th, 1905, and insists, moreover, that one effect of said agreement was the complete payment, release and discharge of the formerly existing obligations represented by the promissory notes in question, and that the remedy of plaintiff upon each of said notes is barred by the statute of limitations.

There can be no doubt, when the agreement in

question was executed, November 27th, 1905 (for aught that appears to the contrary in the declaration), the statute of limitations had run upon each of said demands, and Mrs. Roy then had an adequate legal defense against each and every one of them. But plaintiff insists that, by virtue of the agreement in question, there was a "new promise" on the part of Mrs. Roy to pay the notes, in a certain contingency, namely, the alternative contingency that Mrs. Roy should, [33] without the written consent of the plaintiff, "sell any of her real estate or incur indebtedness amounting at any one time to the sum of One Thousand Dollars (\$1,000) and upwards." And it is upon the basis of an alleged breach of each of said alternatives by Mrs. Roy that plaintiff now claims the right to recover. In this behalf evidence was introduced, over the objection of defendants, to the effect that after the execution of said agreement, and while it was in force, Mrs. Roy not only incurred indebtedness exceeding, in the aggregate, One Thousand Dollars (\$1,000.00),—but also that she made several conveyances of small portions of her land estate in Kona to her son, William F. Roy. And plaintiff's claim herein includes the feature that, by each such violation of the terms of the agreement, Mrs. Roy was remitted to her original obligation to pay the notes in question, both principal and interest.

I find, as facts, that Mrs. Roy did make such conveyances, but I also find that, prior to Mrs. Roy's death, the plaintiff assented to, and ratified said conveyances, and as matter of law, I find that by such consent and ratification, plaintiff excluded herself

from the right to thereafter complain of said conveyances, or, because of such conveyances, to resort to the enforcement of the payment of said notes, or any of them. With respect to the incurring of indebtedness by Mrs. Roy, I find as a fact that she did incur such indebtedness, after the execution of said agreement, to an aggregate of more than One Thousand Dollars at a time, but, for reasons to be hereinafter discussed, I find that said fact did not deprive her of the benefit of the release and discharge of said indebtedness expressed in said agreement.

It is to be noted, with reference to the \$2,000 note, its payment purported to be secured by a mortgage, recited in said [34] agreement, but not alluded to in the body of the declaration. Whatever might be the standing of plaintiff in a court of equity, should she now bring suit to foreclose said mortgage, (as to which I express no opinion), it is to be observed that the present is a suit in assumpsit, wherein she sues upon the promissory notes, ignoring the mortgage security given for the payment of one of them. We must therefore consider this matter as though no mortgage had in fact been given.

Said agreement, after a recital of the execution and nonpayment of the notes in question, and of the mortgage mentioned, proceeds to state that the plaintiff, in consideration of the premises, and of the sum of Ten Dollars (\$10), paid to plaintiff by Mrs. Roy, and in further consideration of the covenants and agreements of Mrs. Roy contained in said agreement,—“doth hereby acknowledge full payment and settlement of said indebtedness, principal and inter-

est, hereinabove set forth, and doth hereby release the same, and cancel and discharge the said notes and mortgages." It would be difficult to conceive of phrases in the English language more pertinent and potent to express and effect a total release and discharge of the notes and mortgage in question. The consideration for said release is recited, and was and is a valuable and valid consideration, and the release itself is executed under seal, a feature to which the decisions of courts have, in the past, attached a peculiar significance,—for it is familiar law that an obligation which has once been released and discharged, especially when so released and discharged by instrument under seal, can never thereafter be revived. It is utterly and absolutely dead, and can have no further existence as a legal obligation. Thus, in *Tyson v. Dorr*, VI Whart. (Pa.) 255, 262–3, the Court said: [35]

"In *Agnew v. Dorr*, V. Whart. 131, the assignment required a full and complete release by the creditors. A condition inserted in his release by a creditor, that he should receive twenty-five per cent of his debt was held to be bad, as not in compliance with the terms of the assignment, and as throwing on the assignees difficulties and embarrassments incompatible with the execution of their trust. But in that case there was no release executed; there was merely a letter written by the creditor, agreeing to become a party to the assignment and release, on condition of the fund paying twenty-five per cent of his claim. This was held to be in its nature merely an ex-

ecutory agreement which could not be enforced without a consideration, and as the creditor could not come upon the fund, his agreement to release would not be enforced. In the present case there is not merely an executory agreement, but a technical release, executed under hand and seal; and the result is different. For, as is said in *Agnew v. Dorr*, it is certain that a technical release will discharge a duty at law, without consideration, and that chancery will not relieve against it, where the releasor has acted with full knowledge of all necessary circumstances. The release, therefore, is, in the present case, clearly binding.

“If, then, the release be binding, and the condition inoperative, by reason of its repugnancy to the terms of the assignment, and the impossibility that it should be performed, the consequence is, that the release remains single and absolute, and extinguishes the debt. For the principle of law has long been settled, that if one gives an obligation, with condition to be void on the performance of that which is impossible at the time of its execution, the bond is single, and it is the same as if there were no condition at all. . . .

“Now, the condition of this release is, that the assignment pays over twenty-five per cent of the claim. But this could never be; for the assignees could not divert the funds from their appropriate channel, which was first to the preferred creditors; next amongst those who ex-

ecuted perfect releases; and lastly, to the assignors. Under no possible circumstances could the assignment pay the releasors anything whatever, if they did not release according to the terms of the assignment; nor could the assignees voluntarily pay any portions, without a breach of their trust, which the law will not suppose beforehand, nor recognize when done as valid in its operation.

“Again, a man cannot release a personal action as an obligation, with a condition subsequent, but the condition will be void; for a personal action once suspended, is extinguished forever: 1 Rol. Ab. 412. For instance, a release, if once operative, cannot be avoided; so that one may make a release to operate on a contingency, but cannot make a release to be void on a condition: 1 Inst. 274, b. A thing once extinguished cannot be revived; or, in other words, if the release be on a condition subsequent, the release is good, and the condition void; 2 Shep. Touch. by Preston, 325; Law Lib. 91st Part, 154. The present is not an instrument by which on a future contingency the release is to become operative; but a release first with a condition which is intended to defeat it subsequently, if the releasor should not receive twenty-five per cent, and the release remains binding, though such condition be never performed.” [36]

“A release by its own operation extinguishes a pre-existing right, and cannot be controlled or explained by parole. A release, therefore,

should be held to include all demands embraced by its terms, whether particularly contemplated or not."

Sherburne v. Goodwin, 44 N. H. 271-277.

"According to Pothier, there are two kinds of release—one called a real release, and the other a personal discharge. A real release is where the creditor declares that he considers the debt as acquitted. It is equivalent to a payment, and renders the thing no longer due, and consequently it liberates all the debtors of it, as there can be no debtors without something due. A personal release merely discharges the debtor from his obligation and extinguishes the debt indirectly where the debtor to whom it is granted was the sole principal, because there can be no debt without a debtor. . . . It only liberates the person to whom it is given."

Booth v. Kinney, 8 Gratt. 560, 568 (citing Pothier, p. 111, c. 3, Art. 2, §§ 1, 11).

"A release is a discharge of a debt by the act of the party, in distinction from an extinguishment, which is a discharge by operation of law."

Baker v. Baker, 28 N. J. Law, 13, 20; 75 Am. Dec. 243.

"The word 'release' when not interpreted by the context has a technical meaning which presupposes a seal; but it is also an apt word to express the general idea of discharge or deliverance. So it is held that a requirement in an assignment for the benefit of creditors that they execute releases, was intended to secure the ab-

solute discharge of the debtor as to creditors coming in under the assignment," and hence any instrument which is sufficient for that purpose was a compliance.

Burgiss v. Westmoreland, 33 So. Car. 425; 17 S. E. 56.

"A release may be under seal, or may not; but, if it has a seal, the same imports consideration."

Winter v. Kansas City Cable Ry. Co., 73 Mo. App. 173, 187.

The language of the agreement in question is so full, explicit, precise and comprehensive, as to leave the court in no doubt as to the intent of the parties to that instrument, wherein the present plaintiff "doth hereby acknowledge full payment and settlement of said indebtedness, principal and interest, hereinabove [37] set forth, and doth hereby release the same and cancel and discharge the said notes and mortgage."

Should we view this transaction from the standpoint of an accord and satisfaction, the same results would follow. The plaintiff and her mother, Mrs. Roy, in and by said agreement, came to an "accord," concerning the previous execution of the obligations in question, and of their then existence; and, they also came to a "satisfaction" of said obligations, as evidenced by the language above quoted from the document itself. Again, it is familiar law that an accord and satisfaction wipes out and discharges the obligations in respect of which the accord and satisfaction are arrived at. Such a transaction usually includes a new or an additional contract or agree-

ment; that is, that the creditor shall accept some lesser sum, or some different character of payment or of service from the debtor, than the sum or service provided for in the original contract. And so, in the case at bar, if we view this transaction as an accord and satisfaction, we find that whereas Mrs. Roy acknowledged the existence of certain obligations of hers to her daughter, the present plaintiff, she, Mrs. Roy, made a new agreement with her daughter to the effect that the daughter should, and did release and discharge all of the obligations as theretofore existing, and, in consideration thereof accepted from her mother the sum of Ten Dollars, together with a new and further agreement that the mother should not thereafter, without the written consent of the daughter, incur financial indebtedness to an aggregate exceeding One Thousand Dollars, or make conveyance of any of her land.

It is now established that Mrs. Roy violated both features of that agreement, but, as to one of said features, the plaintiff by [38] her ratification thereof, has estopped herself to complain of it. As to the other of said features, namely, the incurring of indebtedness, plaintiff now insists that the legal effect of said violation was to revive, reanimate, and inspire with new life, vitality and validity, all of the monetary obligations of Mrs. Roy to her daughter which had, in and by said agreement, been so solemnly acknowledged to have been paid, and to be released and discharged. And plaintiff's counsel has cited a number of authorities in support of this proposition. I have examined said authorities, and

find that they do not by any means support the contention to which they are cited. One case (of my own discovery), I will first consider. It is that of *Byrd Printing Co. v. Whitaker Paper Co.*, 135 Ga. 865; 70 S. E. 798; 22 Ann. Cases (1912A), 182. In that case, as in the present, there had been a transaction which the Court construed as an accord and satisfaction. As a part of the new agreement the Byrd Printing Co. had given its check to the other party for a considerable amount. Some further friction having arisen between the parties before the presentation of the check for payment, its payment had been stopped by the maker, and the suit in question was brought to collect the amount of the check. The Byrd Company (maker of the check) claimed immunity upon the ground that the Whitaker Company had violated the new agreement, and claimed that, because of such violation the parties were thereby remitted to their former status, as existing between the date of the accord and satisfaction, but the Supreme Court of Georgia, in repudiating this doctrine, used the following language:

“The mere breach of the contract or a declared intention of one of the parties not to abide by it, would not of itself operate to restore the status of the parties as it existed prior to the execution of the contract.”

And so, in the case at bar, the mere breach by Mrs. Roy, of the contract expressed in the document of November 27th, 1915, did [39] not restore the parties to their former status, or clothe plaintiff with

a right to recover upon the promissory notes in question. It is conceivable, (but as to this point I express no opinion), that plaintiff might have maintained against her mother an action for damages for the breach of the contract in question, and might have recovered such damages as she should have shown herself to have suffered by reason of such breach. But the action now at bar must be carefully distinguished from any such action as is herein supposed. This present suit is based solely upon the assumption that Mrs. Roy's breach of the agreement of 1905, restored the former status of the parties with reference to the rights and obligations involved in the promissory notes in question. That assumption, in my opinion, is not well founded, and cannot prevail.

The citations of plaintiff's counsel include a number of cases cited in Wald's Pollock on Contracts (3d Ed.), p. 814, upon the topic of conditional releases. I quote from the text as follows:

"A release may be subject to the happening of a condition precedent. And it has been held that it may also be subject to a condition subsequent."

Citing Slater v. Jones, L. R. 8 Exch. 186; Newington v. Levi, L. R. 5 C. P. 607, and, on appeal, L. R. 6 C. P. 180.

Those cases had to do with a construction of the English Bankruptcy Act, and although different members of the two courts before whom they came gave expression to *obiter dicta* to the effect that a release may be subject to a condition subsequent to the

extent that a breach of the agreement or condition upon which the release is executed may restore the former status of the parties, yet [40] it is to be observed that no such question was involved in either of the cases cited, and no actual decision to that effect was made in either case. Several of the Judges referred to, in the course of their opinions, mentioned the case of *Ford v. Beech*, 11 Q. B. 852, 867, wherein the doctrine was laid down that—"The right to bring a personal action once existing, and, by the act of the party suspended for ever so short a time, is extinguished and discharged, and can never revive."

There is no lack of further authorities upon the general subject of the effect of a release, once executed, upon sufficient consideration. Thus, in *Allen v. Ruland*, 79 Conn. 411-412, 118 Am. St. Rep. 146, 150, which was an action for false imprisonment, a release of one or more of the alleged trespassers was pleaded in bar of the action. The Court said: "Each release was in its nature the final embodiment in written words of the agreement of the parties. Its dominant purpose was not to acknowledge the receipt of certain moneys or articles of property, but to state something done in consideration of their receipt. A receipt is evidence that an obligation has been discharged, but a release is itself a discharge of it. A discharge is a fact, which cannot be explained away, as against any one whose interests may have been affected by it."

And the Supreme Court of the United States, in

discussing the effect of a release, has used the following language,—

“The release being once regularly executed and delivered could not afterwards be avoided at law by a failure of one of the parties to perform an act in consideration of which the release was given.”

Fitzsimmons v. Ogden, 7 Cranch 1, 2, 19; 3 Law Ed. 255.

And the Supreme Court of Illinois, in *Kingsley v. Kingsley*, 20 Ill. 203, 208, in discussing the effect of a release that had been prematurely signed and delivered, before certain of the incidents [41] therein contemplated had been performed, cites the foregoing case of *Fitzsimmons v. Ogden* with approval, and uses the following language:

“The release was executed on the delivery of the notes, and there is no fraud shown, either in its execution or delivery. The most that can be said is, that complainant did not perform his contract; but that does not render the release ineffectual. The release being once fairly and regularly executed and delivered, could never afterwards be avoided at law by a failure of one of the parties to perform an act in consideration of which the release was given. It could go no further than to charge the complainant with a breach of contract, for which he would be liable.”

The result of the authorities, applied to the facts admitted and found herein, must, in my opinion, be

a judgment in favor of the defendants, for their costs in this cause. And it is so ordered.

Dated this 10th day of July, 1916.

[Seal] (S.) C. W. ASHFORD,
First Judge.

[Endorsed]: Law No. 7950. Reg. 4, p. 416. Circuit Court, First Circuit, Territory of Hawaii. Caroline J. Robinson, Plaintiff, vs. Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased, Defendants. Opinion and Decision. Filed at 9:30 o'clock A. M. July 10th, 1916. (S.) J. C. Cullen, Clerk. [42]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

CAROLINE J. ROBINSON,
Plaintiff,

vs.

LORRIN A. THURSTON and JOHN D. PARIS,
Executors Under the Will of ELIZA ROY,
Deceased,
Defendants.

Plaintiff's Exceptions.

Comes now Caroline J. Robinson, plaintiff in the above-entitled cause, by her attorneys, Holmes & Olson, and does hereby except to the decision filed in the said cause by the Honorable C. W. Ashford on the 10th day of July, 1916.

Dated, Honolulu, T. H., July 11th, 1916.

(S.) HOLMES and OLSON,
Attorneys for Plaintiff.

[Endorsed]: L. No. 7950. Reg. 4, Pg. 416. In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. Caroline J. Robinson, Plaintiff, vs. Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased, Defendants. Plaintiff's Exceptions. Filed at 3:40 o'clock P. M. July 11th, 1916. (S.) J. A. Dominis, Clerk. Holmes & Olson, 863 Kaahumanu St., Honolulu, Attorneys for Plaintiff. [43]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

CAROLINE J. ROBINSON,

Plaintiff,

vs.

LORRIN A. THURSTON and JOHN D. PARIS,
Executors Under the Will of ELIZA ROY,
Deceased,

Defendants.

Judgment.

This cause coming on regularly for trial on the 1st day of June, 1916, before the court, without a jury, a jury having been expressly waived, Holmes and Olson, appearing as attorneys for the plaintiff, and Andrews & Pittman, appearing as attorneys for the defendants, oral and documentary evidence was introduced on behalf of the plaintiff and defendants,

and the same having been closed, the court files its findings and decisions in writing, and orders judgment in favor of the defendants.

WHEREFORE, by reason of the law and the findings aforesaid, it is by the court hereby ordered, adjudged, and decreed, that plaintiff take nothing by her action herein against the defendants, or either of them, and that the defendants do have and recover of and from the plaintiff their costs and disbursements incurred herein, amounting to the sum of \$481.55.

Judgment entered this 18th day of July, 1916.

By the Court:

(S.) J. A. DOMINIS,
Clerk.

[Endorsed]: L. No. 7950. Reg. 4, pg. 416. In the Circuit Court of the First Judicial District, Territory of Hawaii. Caroline J. Robinson, Plaintiff, vs. Lorrin A. Thurston, and John D. Paris, Executors Under the Will of Eliza Roy, Deceased, Defendants. Judgment. Filed at 9:40 o'clock A. M. July 18th, 1916. (S.) J. A. Dominis, Clerk. Andrews & Pittman, Attorneys for Defendant. [44]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

CAROLINE J. ROBINSON,

Plaintiff,

vs.

LORRIN A. THURSTON and JOHN D. PARIS,
Executors Under the Will of ELIZA ROY,
Deceased,

Defendants.

Exception.

Plaintiff hereby excepts to the (S.) H. & O. judgment entered in the above-entitled cause on the 18th day of July, 1916, adjudging that plaintiff's complaint be dismissed, that plaintiff take nothing by her said action against the defendants, or either of them, and that defendants do have and recover of and from the plaintiff their costs and disbursements incurred in said cause, on the ground that the same is contrary to law.

Dated Honolulu, T. H., August 1st, 1916.

(S.) HOLMES and OLSON,
Attorneys for Plaintiff.

The above exception is hereby allowed.

Aug. 1st, 1916.

(S.) C. W. ASHFORD,
First Judge, Circuit Court, First Judicial Circuit,
Territory of Hawaii.

[Endorsed]: L. 7950. Reg. 4, pg. 416. In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. Caroline J. Robinson, Plaintiff. Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased, Defendants. Exception. Filed at 10 o'clock A. M. August 1, 1916. (S.) Henry Smith, Clerk. Holmes & Olson, 863 Kaahumanu St., Honolulu, Attorneys for Plaintiff. [45]

**Minutes of the Clerk of the Circuit Court of the First
Judicial Circuit, Territory of Hawaii.**

THURSDAY, JUNE 1st, 1916.

AT TERM—2 O'CLOCK P. M.

Present: Hon. C. W. ASHFORD, First Judge Presiding.

H. K. ASHFORD, Clerk.

J. L. HORNER, Reporter.

L. 7950.

CAROLINE J. ROBINSON,

Plaintiff,

vs.

LORRIN A. THURSTON and JOHN D. PARIS,
Executors Under the Will of ELIZA ROY,
Deceased,

Defendants.

ASSUMPSIT.

C. H. OLSON, Esq. (HOLMES & OLSON),
Counsel for the Plaintiff.

Messrs. ANDREWS & PITTMAN, Counsel for
the Defendants.

TRIAL—JURY WAIVED.

Counsel for both parties appeared in court, and on behalf of their respective clients, waived trial by jury herein.

Counsel for the plaintiff thereupon read the Complaint herein, and, during the reading of said complaint was permitted to amend the date therein set

forth as the "9th day of April," to read the "4th day of April," 1916. At the close of the reading of the complaint, Mr. Andrews, of counsel for the defendants, read the amended answer, as amended by striking out certain words by agreement of counsel in open court. Said answer admitting the allegations of paragraphs 1, 2, 3 and 4 of the first count, and the same paragraphs as relative to the other counts with regard to the execution of the notes in question.

Mr. Olson then offered in evidence a certain Agreement dated November 27th, 1905, between Caroline J. Robinson and Eliza Roy, [46] a copy of which said agreement had been attached to the complaint as Exhibit "D" of said complaint.

Counsel for the defendants admitted the said agreement to have been executed on the above date, whereupon, by consent, the original agreement was received in evidence, and marked Plaintiff's Exhibit "B." Counsel for the defendants at the request of counsel for the plaintiff, admitted that at the time Exhibit "A" was executed, the plaintiff was the owner and holder of the promissory notes mentioned in the complaint.

Counsel for the plaintiff offered in evidence the transcript of the testimony of Thomas C. White, Esq., taken before the Hon. T. B. Stuart, 3d Judge of this court. The said transcript, together with the exhibit therein referred to, was, by consent of counsel, received in evidence and the whole marked collectively Plaintiff's Exhibit "A."

Counsel for both sides thereupon made certain admissions which are set forth in full in the Reporter's Notes, dealing with the amounts of money which Mrs. Roy was asserted to have been indebted to outside parties; with the fact that the claim of the plaintiff on behalf of these notes, had been made upon the executors within the time prescribed by law, and certain other admissions with regard to the payment of interest on the said notes.

At 3:07 P. M. the Court took a recess.

At 3:15 P. M. the Court resumed, whereupon the plaintiff rested, it being understood between the parties that the defendants should be permitted to later file certain deeds made by Mrs. Eliza Roy to Mrs. Thomas C. White and Mrs. Allan Wall.

The defendants then called (1) Caroline J. Robinson, sworn and testified.

At 3:34 P. M. the defendants rested, whereupon it was again [47] stipulated, that the defendants should have permission to file certified copies of the deeds made by Eliza Roy to Mrs. Thomas C. White and Mrs. Allan Wall, subsequent to the agreement previously introduced and received in evidence as Exhibit "B"; or, at their option, to produce in court the books of record from the Registrar's Office in which said deeds have been recorded.

At 3:35 P. M., Mr. Olson, argued the case on behalf of the plaintiff.

At 4 P. M., Mr. Pittman on behalf of the defendants, argued on behalf of the defendants, and was followed at 4:20 P. M. by Mr. Andrews, who continued the argument in favor of the defendants.

At 4:30 P. M. the Court continued further hearing in this cause until 2 o'clock P. M. to-morrow, June 2d, 1916, and adjourned to 9 o'clock A. M. to-morrow, June 2d, 1916.

By Order of the Court:

(S.) J. C. CULLEN,

Clerk. [48]

FRIDAY, JUNE 2d, 1916.

AT TERM—2 O'CLOCK P. M.

Present: Hon. C. W. ASHFORD, First Judge Presiding.

H. K. ASHFORD, Clerk.

J. L. HORNER, Reporter.

L. 7950.

CAROLINE J. ROBINSON,

Plaintiff,

vs.

LORRIN A. THURSTON and JOHN D. PARIS,
Executors Under the Will of ELIZA ROY,
Deceased,

Defendants.

ASSUMPSIT.

C. H. OLSON, Esq. (HOLMES & OLSON),
Counsel for the Plaintiff.

Messrs. ANDREWS & PITTMAN, Counsel for
the Defendants.

TRIAL—JURY WAIVED, FROM YESTER-
DAY.

Upon the opening of court, Mr. Andrews, of counsel for the defendants, by agreement, was permitted

to reopen the case for the defendants for the purpose of offering in evidence certain deeds from Mrs. Eliza Roy to W. F. Roy, Mrs. Allan Wall and Mrs. Thomas C. White, and for this purpose called (2) James K. Ahloy, sworn and testified.

Mr. Ahloy on being called to the stand, produced the Registry Books in which the said deeds were recorded, and read the deeds in question into the record with the exception of the descriptions. Said deeds being read from Liber 310, page 5; Liber 317, page 151; Liber 355, page 283; Liber 371, page 9.

The defendants then called (3) John D. Paris, sworn and testified.

At 2:34 P. M. the defendants rested, whereupon the plaintiff immediately did the like.

Counsel for the plaintiff having previously 'argued his case in chief to the Court,—Mr. Andrews for the defendants, argued the matter on behalf of his clients, and, at the close of Mr. [49] Andrews' argument, Mr. Olson, for the plaintiff, closed the case.

At 3:20 o'clock P. M. the *Court* the matter under advisement, promising a written decision as soon as possible,—and adjourned to Saturday, June 3d, 1916, at 10 A. M.

By Order of the Court:

(S.) J. C. CULLEN,

Clerk. [50]

MONDAY, JULY 10th, 1916.

L. 7950.

CAROLINE J. ROBINSON,

Plaintiff,

vs.

LORRIN A. THURSTON and JOHN D. PARIS,
Executors Under the Will of ELIZA ROY,
Deceased,

Defendants.

ASSUMPSIT.

HOLMES & OLSON, Counsel for the Plaintiff.
ANDREWS & PITTMAN, Counsel for the
Defendants.

At 9:30 o'clock A. M. this day, the Court filed its
written opinion and decision in this cause, finding
in favor of the defendants.

By Order of the Court:

(S.) J. C. CULLEN,

Clerk. [51]

TUESDAY, JULY 18th, 1916.

AT TERM.

L. 7950.

CAROLINE J. ROBINSON,

Plaintiff,

vs.

LORRIN A. THURSTON and JOHN D. PARIS,
Executors Under the Will of ELIZA ROY,
Deceased,

Defendants.

ASSUMPSIT.

Messrs. HOLMES & OLSON, Counsel for the
Plaintiff.

Messrs. ANDREWS & PITTMAN, Counsel for
the Defendants.

The bill of costs of the defendants in the sum of \$481.55, having been O. K.'d by counsel for the plaintiff herein, was this day allowed by the Court in the above sum, and duly filed.

By Order of the Court:

(S.) J. C. CULLEN,
Clerk. [52]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

CAROLINE J. ROBINSON,

Plaintiff,

vs. .

LORRIN A. THURSTON et al.,

Defendants.

Testimony.

June 1st, 1916.

(Complaint read.)

The COURT.—By the way, gentlemen, I understand there is a demand for a jury trial.

Mr. OLSON.—We waived that.

Mr. ANDREWS.—Both of us, in open court.

Mr. OLSON.—That was waived in open court.

The COURT.—Well, who accepted the waiver?

Mr. OLSON.—Mr. Stuart.

The COURT.—Well, that might do for Judge Stuart, but I don't feel very much disposed to try the facts—

Mr. OLSON.—Well, if your Honor please, the facts,—there are no facts really to be—to try, your Honor.

Mr. ANDREWS.—No, it is a question of law.

Mr. OLSON.—Purely and simply.

The COURT.—Very well.

Mr. OLSON.—I now offer in evidence an agreement made the date of the 27th day of November of 1905.

The COURT.—Is that one of the exhibits, the original of one of the exhibits.

Mr. ANDREWS.—The original Exhibit “D,” your Honor. [53]

Mr. OLSON.—While the year is not stated specifically—an agreement between Caroline J. Robinson and Mrs. Eliza Roy, widow of W. F. Roy of Kona, Island of Hawaii, being the document referred to in the complaint as Exhibit “D.”

Mr. ANDREWS.—No objection.

Mr. OLSON.—You will admit, will you, Mr. Andrews, that the—this is the—this agreement was executed by the parties purporting to execute it, namely, Caroline J. Robinson and Eliza Roy, rather signed by her mark?

Mr. ANDREWS.—Yes.

The COURT.—Well, will you agree upon the date, the year?

Mr. ANDREWS.—Yes, your Honor, we agree on that date, 1905.

The COURT.—You consent then—

Mr. ANDREWS.—Yes, your Honor.

The COURT.—that this may be admitted as an exhibit, do you, Mr. Andrews?

Mr. ANDREWS.—Yes, your Honor.

The COURT.—Very well. This will be admitted as Exhibit “A,” for the plaintiffs.

Mr. OLSON.—At the time of this agreement, which has been admitted in evidence as complainant’s Exhibit “A,” was executed, the plaintiff was at that time the owner and holder of promissory notes which have been admitted in the answer.

Mr. ANDREWS.—That is admitted.

Mr. OLSON.—Paragraph 5 of the first count of the complaint.

The COURT.—When this Exhibit “A,” now admitted, was executed, namely on the 25th of November, 1905, the present plaintiff was the owner and holder of all of the promissory notes mentioned in the complaint?

Mr. OLSON.—Exactly. That is admitted?

Mr. ANDREWS.—Yes. [54]

Mr. OLSON.—At this time, if the Court please, I wish to offer in evidence testimony of Thomas C. White, taken before the Honorable T. B. Stuart, Third Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, on Thursday, February 10th, 1916, the same having been taken by consent of the parties, together with the exhibit therein referred to, which is among the papers, I think.

The COURT.—I assume that the Circuit Judge

before whom it was taken disposed of any objections that were made?

Mr. ANDREWS.—He reserved the question of the ruling until the final decision of the case, so we have to put it up to your Honor finally, but it was taken before the Judge and all objections were made and argued out at that time. As your Honor will see, he reserved the ruling on my principal objection until the entire case was presented.

(Mr. Olson reads testimony.)

Mr. OLSON.—At this time I will ask the defendants to admit that shortly prior to Mrs. Roy's death she became indebted up to the amount of \$1,368.45, in the aggregate, this amount including the \$768.00 which is represented by the bill or account attached to Mr. White's testimony of \$768.00. That is, in order to permit counsel to make his objection, of course, through the Court's considering \$768.00, but counsel, as I understand it, are prepared to admit that that amount of indebtedness had been incurred in the aggregate shortly before her death, including this amount set forth in the account attached to Mr. White's testimony.

Mr. ANDREWS.—I do not like to admit it in that language. Possibly a distinction that—Might admit that, at the time [55] of Mrs. Roy's death, there are claims which have been admitted by the executors against her estate aggregating the sum of \$1,368.45, and which claims would include, if allowed, the claim of White in full, \$768.00, subject to our objection as to the Statute of Limitations.

Mr. OLSON.—I want to get that correct. Those

are the claims which were presented to the executor, that is the total amount?

Mr. ANDREWS.—Yes, that have been admitted by them.

Mr. OLSON.—And I want the admission in this shape, so that the court would be entitled to take into consideration the \$165, which Mr. White testified to in his testimony in addition—

Mr. ANDREWS.—Well, that was paid before her death.

Mr. OLSON.—Yes, I know, but it was an indebtedness. That was at the time of her death, and prior to that time, a few months before, while she was on her deathbed, there is the additional sum of \$165.00 testified to by Mr. White which was paid back before her death.

Mr. ANDREWS.—Yes.

Mr. OLSON.—But that was an indebtedness which existed at the same time as these other debts, amounting to \$165.00? That is correct?

Mr. ANDREWS.—I suppose so; I do not admit any more than is in the evidence. Whatever is in the evidence I am perfectly willing to admit.

Mr. OLSON.—You are willing to admit that T. C. White testified—

Mr. ANDREWS.—Testified as set forth in that evidence.

Mr. OLSON.—And if the evidence is to be considered, then [56] that is to be considered?

As I understand it, the only item which Mr. Andrews claims cannot be taken into consideration in this proceeding, out of that indebtedness of \$1,368.45,

is the amount shown in this account attached to Mr. White's testimony; that is correct, is it not, Mr. Andrews?

The COURT.—Namely, Exhibit "A."

Mr. ANDREWS.—The amount up to within six years of the time of Mrs. Roy's death.

The COURT.—Yes, as shown in that account.

Mr. ANDREWS.—Yes.

The COURT.—All the other indebtedness you admit?

Mr. ANDREWS.—We admit.

Mr. OLSON.—Can be taken into consideration as going toward the breach of the condition, if the condition in the agreement is a valid condition. That is a fair statement?

Mr. ANDREWS.—Yes—I don't like to admit the latter portion of Mr. Olson's statement, because we deny, of course, that there was any valid—

Mr. OLSON.—Oh, yes, I say, but if it is valid condition—

Mr. ANDREWS.—Any valid condition at all. The first part of this we admit absolutely and I think is sufficient.

Mr. OLSON.—I think that covers the matter. Mr. Andrews, do you,—will you admit that within the time prescribed by law for the presentation of claims of creditors against the estates of deceased persons, the plaintiff in this case presented her claim, the claim, the one forming the basis of this suit, and that the suit was within the time prescribed by law for bringing suit, the same having been rejected by the executors?

Mr. ANDREWS.—Yes, that is admitted. [57]

Mr. OLSON.—And will you also admit that none of these notes, I think, principal and interest, except as set forth in the complaint, have ever been paid.

Mr. ANDREWS.—That is admitted.

Mr. OLSON.—And will you also admit allegations of the paragraphs, 1, 2, 3 and 4 of the first count, which you have admitted in your answer; will you admit the allegations therein contained as far as they are incorporated in the 2nd, 3d and 4th counts?

Mr. ANDREWS.—Yes.

Mr. OLSON.—Mr. Andrews having requested me so to do, I will admit that the payment of interest on account of \$3,750.00 note, which is set forth—or which allegation is set forth in paragraph 3 of the first count, that payment was made in its entirety, not later than August 19th, 1889, \$1,030.00. I wish to state at this time, if the Court please, that the allegation in paragraph five of the first count, wherein it is alleged that Eliza Roy sold and conveyed certain portions of her real estate without the consent of the plaintiff,—that this allegation I have found since the complaint was filed is incorrect. In going over the matter with Mrs. Robinson I did not understand exactly the situation, nor did she. As I find, that one of those deeds was made—that she consented to each one of the conveyances made. One of these conveyances Mrs. Robinson consented to after its actual execution, a few days after its actual execution.

The COURT.—But she ratified it?

Mr. OLSON.—Yes, she ratified it.

(Argument.)

I admit that a few days after the execution of one [58] of these deeds Mrs. Roy and Mrs. Robinson had a conference together, at which Mrs. Robinson gave her consent in writing to the deed already given, a ratification of it, and she did this—did this on account of Mrs. Roy's making these two conveyances to Mrs. Wall and Mrs. White, two of her daughters, which were ratified expressly at the same time they were executed by Mrs. Robinson. In other words, that Mrs. Robinson agreed to and she did ratify and consent to the deeds that were made, upon Mrs. Roy's making conveyances to her two daughters, Mrs. White and Mrs. Wall, at Mrs. Robinson's request, which were consented to expressly in writing by Mrs. Robinson at the time they were executed.

The COURT.—Yes, but do you admit that the deeds, or the making of the deeds which Mrs. Robinson, after its execution, ratified, was in violation of the conditions of the agreement, Exhibit "B"?

Mr. OLSON.—No, I do not admit that it was, because as a matter of fact, it was a deed of gift to Mr. Roy and was not a sale.

The COURT.—Very well then, you make no admission upon this point.

Mr. OLSON.—I admit the conveyance, but I don't the violation of the conditions.

(Argument.)

The COURT.—Then you rest.

Mr. OLSON.—Yes.

Mr. ANDREWS.—If the Court please, the first portion of our defense, we will offer in evidence, and ask permission to do it later, certain deeds made by Mrs. Roy, Mrs. Eliza Roy, to Will Roy and Mrs. Ellen Wall and Mrs. Thomas White, or in [59] their—I don't know whether it is in their husband's names, the deeds, but—or their own names, but we will bring you those as soon as we can obtain them.

Mr. OLSON.—I have no objection to that.

Testimony of Caroline J. Robinson, for Defendants.

CAROLINE J. ROBINSON, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. ANDREWS.)

Q. Your name is Carry Robinson? A. Yes.

Q. Mrs. Robinson, I hand you what we call in this case Exhibit "B"; that is the agreement you and your mother made, with Mr. Thurston as a witness, in 1905, November 27th?

A. May I look at it and read it?

Q. Yes. While Mrs. Robinson is examining this document I think I will ask your Honor's permission to amend the complaint by striking out that one allegation I referred to, with Mr. Andrew's consent, which I think he will give.

The COURT.—What is the allegation?

Mr. OLSON.—The allegation on page 5 of the complaint, beginning at the end of the 6th line and reading as follows: "That thereafter, between the 31st day of July, 1908—" (Reads.)

(Testimony of Caroline J. Robinson.)

Mr. ANDREWS.—We do not consent, with all due respect, to that being stricken out.

Mr. OLSON.—I offer to amend the complaint.

(Argument.)

The COURT.—Well, I feel, Mr. Olson, that those lines have gone in there deliberately by your own hand and they ought to stay there, if the defense feels there is any advantage [60] to them in having them there, and, therefore, I will have to rule against you, I think.

Mr. OLSON.—Well, very well, I will just note an exception.

Mr. ANDREWS.—You have read that paper, haven't you? A. Yes.

Q. Now, after that was signed by you and your mother Eliza Roy— A. Yes.

Q. And before your mother's death, did she make any conveyance of real property to Willie Roy?

A. To Willie and the two girls.

Q. Yes, and which was made first, the one to Willie or the one to the two girls?

A. Well, she wanted to make a—one to Willie Roy, and I told her that I wouldn't give my consent unless she gave them share and share alike,—the two girls. I told her the two girls were working for her and nursing her and taking care of her and so I wouldn't—I told her I wouldn't sign any papers unless she treated them all alike and share and share alike.

Q. How did you first know that your mother was making a conveyance to Willie Roy?

(Testimony of Caroline J. Robinson.)

A. She asked me—I went up there and—well, the first time she gave Willie Roy some property I went up and I told her that she—that she was—that she had broken the agreement, and I came home, and then, when she was sick, the last time she was sick, she wanted me to go up, and I went up there. They wired to me and I went up there and we talked it over and she asked if—then I said, too, if she treat them, give them share and share alike, I would agree and I would sign the papers. [61]

Q. Yes, but, Mrs. Robinson, wasn't it a fact that you first knew that she had deeded property to Willie Roy by seeing it in the paper?

A. Yes, but that—at that time, years before this.

Q. Yes, was years before what?

A. Before the last deeds. That—with that—what she gave to Willie Roy and the girls, my sisters.

Q. But it was after this deed that you saw in the papers, to Willie Roy, that was after you and your mother had signed this paper in November, 1905, wasn't it?

A. No, she sold that property to Willie first.

Q. After this— A. Although—

Q. After this agreement, this release was executed, and after she made this agreement with you, then she sold some property to Willie Roy? A. Yes.

Q. Conveyed some property to Willie Roy?

A. Yes.

Q. And you didn't know of that until after you saw it was done in the papers?

A. In the paper, yes, that was the first time.

(Testimony of Caroline J. Robinson.)

Q. And then what did you do, when you saw in the paper that your mother had given certain property or deeded certain property to Willie Roy?

A. I went up to Mr. Thurston and told Mr. Thurston.

Q. That was in Honolulu?

A. In Honolulu. I went right up and I wanted his advice and he told me to—

Q. Your mother was living in Kona, Hawaii?

A. Yes. [62]

Q. And you were living in Honolulu?

A. Yes.

Q. And then you went up to Mr. Thurston, spoke to him about it? A. Yes.

Q. And, without saying what he said or anything, then what did you do? You went to Kona, didn't you?

A. Well, he advised me to find out more about it, to find out the truth about it, so I took this steamer right away and went up.

Q. Went to Kona? A. Yes.

Q. And then you went to your mother's home in Kona? A. Yes.

Q. Do you remember how many days that was after you saw the article in the paper that your mother had deeded this property to Willie Roy that you went to Kona?

A. I really can't remember, but I took the first steamer that left here.

Q. May have been a week afterwards, perhaps?

A. Well, I don't know if it was—you know the

(Testimony of Caroline J. Robinson.)

Mauna Loa used to go once a week, I think.

Q. Once a week?

A. Yes. I can't exactly tell you.

Q. Now, that time when you went up and saw your mother, at the time you took that—the steamer and went up and saw your mother, what did you say to her when you got up there, as near as you can remember?

A. Well, I told her that I saw in the papers that she conveyed some property, land, to Willie Roy, and I looked for the girls' names, I didn't see the girls' names, because mother and I made an understanding that she wanted to give them a few acres apiece, and I said all right and "you have the papers made and send it down and I will sign them," but [63] when I came back, and it was some time afterward, then I saw in the paper where Willie Roy's name—and I looked for the girls' names, I didn't see the girls' names, so I went right up to Mr. Thurston, told him.

Q. When you saw your mother, you told her, "Why, Mother, you have deeded some property to Willie Roy"—

A. Yes.

Q. "And you have not deeded to the girls"?

A. I told her.

Q. That is correct?

A. And I told her that, "You know, Mother, that I didn't sign that, that—"

Q. Deed to Willie Roy?

A. Yes, "So you have broken our agreement."

Q. Then what did you do?

(Testimony of Caroline J. Robinson.)

A. Well, I came back again and went up to Mr. Thurston's again and told him, because I wouldn't do anything without his advice, because I wanted his advice—I came up and I went right up and I told Mr. Thurston that my mother has really signed, and I told him that I went to Mr. Paris about it, asked him if it was so and he went to Hawaii and I went to learn that again, and he went up and I came back and went to Mr. Thurston's.

Q. Did you then afterwards consent on this Willie Roy's deed,—your consent to it?

A. Well, I thought—

Q. Did you do so?

A. Yes. The upper part, but the lower of course when they make the deed for me to sign I told my mother I wouldn't sign any property to Willie Roy unless it was that she gave the girls some. [64]

Q. But you did ratify— A. Yes.

Q. This deed that she made to Willie Roy, sometime afterwards?

A. Yes, when she was sick.

Q. About how long was that,—some months afterwards, she made it, or years afterwards?

A. Oh, a few—I think it was three or four weeks before her death; I don't remember.

Q. About three or four weeks before death?

A. It was very—just before her death, because she wanted to see that they had something, you know. It was before her death. I am so nervous I can't—

Q. Don't you worry, we are all old friends of yours; you know everybody here.

(Testimony of Caroline J. Robinson.)

A. I am afraid I might be mistaken.

Q. Don't be. Now, Mrs. Robinson, do you remember how many deeds your mother did make to the girls or to Willie Roy,—any other deeds besides this one you have spoken of, after you and your mother made this agreement between you?

A. I don't remember how many deeds of the property. That was the only three deeds I agreed to.

Q. There was three deeds?

A. There were three deeds, one to Willie Roy and one to my sister Mrs. White and one to my sister Mrs. Wall.

Q. Mr. Paris—I will ask you—told me that there were two deeds to Mrs. Wall and two to Mrs. White; is that correct or—

A. No, I think—I think—I think—I really have forgotten now, I think, because mother came to me again and asked me again; I think Mr. Paris was present at the time [65] that these other deeds—he wasn't there with us—

Q. Now, all of these deeds that were made to the girls, if there was more than one deed,—

A. Yes, sir, whatever it was right.

Q. I don't know, and you don't remember, were they made at the time the deed was made or did you sign them after your mother had given the deeds to the girls?

A. The lawyer made them and took them to my mother's bedroom, and I was there, I think.

Q. At the same time, and signed them?

A. Yes, I signed, but the other deed, about Waiho,

(Testimony of Caroline J. Robinson.)

a piece of old homestead at Waiho, I don't know whether it was made the same day; I have forgotten that.

Q. Who was that given to?

A. To my mother—always said she would give them to my sister Mrs. Wall.

Q. Did she give it to Mrs. Wall? A. I think so.

Q. Was that deed made to Mrs. Wall before you signed it and then you signed it afterwards; when she was sick, or not?

A. Well, all the papers that was given to the girls and Willie Roy, mother and I agreed to give it to them, you know. She asked me and so I agreed to give them that.

Q. The girls?

A. Yes, so the papers was made and I signed.

Q. But now, getting back to Willie Roy's—she didn't ask them— You didn't agree to that at the time she made it; you signed that afterwards, isn't that correct? A. You mean—

Q. The one to Willie Roy, the old deed that was made when you went up to Kona to scold your mother about it, you had [66] not agreed to that before that? A. No.

Q. That was made after?

A. Yes, I thought when she did that she had broken the agreement and I told her that, and I was under the impression and I told her—the lawyer that made the paper all about this so that he could understand.

Q. Now, did you ever make any statements, Mrs.

(Testimony of Caroline J. Robinson.)

Robinson, before your mother's death and claimed that she had broken the agreement? Did you bring any proceedings of any kind against your mother before you brought this proceeding?

A. Well, Mr. Thurston was not present. My—we were waiting for him; he was my attorney. He was not present in town. My mother wanted to see him too but she did—before Mr. Thurston got back—I had nobody to run to; I don't know—I had no—I always went to Mr. Thurston for anything, you know.

Q. Yes.

A. And so I had nobody to advise me then.

Q. So you didn't make any claim, though, until you—yourself at all?

A. I told my mother and I told the lawyer that made the papers that my mother has broken her agreement.

Cross-examination.

(By Mr. OLSON.)

Q. This deed to Willie Roy, which you first did not consent to, which was made without your knowledge and you got notice of it through the newspaper, that was a deed of gift, wasn't it, to Mr. Roy?

Mr. ANDREWS.—That will speak for itself. We object to it. [67]

The COURT.—I think so.

Mr. OLSON.—Q. Well, now, Mrs. Robinson, when—afterwards, as I understand it, you put your written consent on that deed, when Mrs. Roy made the other conveyances to the two sisters, Mrs. Wall and Mrs. White; it was because your mother made these

(Testimony of Caroline J. Robinson.)

deeds to Mrs. Wall and Mrs. White that you signed your— A. Yes.

Q. Written consent on that Roy deed?

A. Yes, that is why I signed it.

Q. And all of the other deeds to Mrs. Wall and Mrs. Roy were signed by you with your consent—that is, you wrote your consent on those deeds?

A. Yes.

Q. At the same time that Mrs. Roy executed them?

A. Yes.

Mr. OLSON.—That's all.

Now, then, Mr. Andrews, I take it, is going to insist upon that motion that he made in connection with taking Thomas White's testimony. Will you present that now? I understand that you moved to strike out all of the items of the account previous to six years prior to the—

Mr. ANDREWS.—Death of Mrs. Roy.

Mr. OLSON.—Death of Mrs. Roy.

Mr. ANDREWS.—Well, I can present it now or can present it on the entire argument just as your Honor prefers.

The COURT.—When will you be ready to present your entire argument?

Mr. ANDREWS.—Right now, your Honor.

The COURT.—Have you any other? [68]

Mr. ANDREWS.—No, your Honor, except with the permission to file these deeds.

The COURT.—You rest then with the exception of that?

Mr. ANDREWS.—Yes.

(Testimony of Caroline J. Robinson.)

The COURT.—Very well, it is understood that the defense shall have permission to file certain copies of any deeds made by the plaintiff.

Mr. ANDREWS.—Made by Eliza Roy.

The COURT.—Made by Eliza Roy to other parties, since the execution of the document on file as Exhibit “B,” or, at their option, to bring the books containing the records into court.

Mr. OLSON.—Mr. Andrews wishes to argue this matter of the White testimony in his main argument. I will then proceed with the presentation of the case of the plaintiff.

(Argument.)

Mr. ANDREWS.—Are you willing to admit at this point that Mr. White and his wife made their home at the home of Mrs. Roy for some 15 years or thereabouts prior to her death?

Mr. OLSON.—No, I do not admit that, I do not know that it is the fact.

(Argument.)

I don't want to admit it because I do not consider that it has any materiality in the case. The testimony is flat-footed that it was Mrs. Roy's own obligation and that he paid these bills out for her for her account, at her request.

Mr. ANDREWS.—We would like, if the Court feels—on the Court's suggestion, we would like to open the testimony for the purpose of—this being a matter on which your Honor has facts all the way—

(Argument.) [69]

The COURT.—The defense will be permitted to

reopen the case for the purpose of putting on testimony to that effect.

(Hereupon the further hearing of this case is continued until 2 o'clock to-morrow afternoon.) [70]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

CAROLINE J. ROBINSON,

Plaintiff,

vs.

LORRIN A. THURSTON et al.,

Defendants.

June 2, 1916—Afternoon Session.

Testimony of James K. Aloï, for Defendants.

JAMES K. ALOI, a witness called on behalf of the defense, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. ANDREWS.)

Q. And you are employed in the Registrar of Conveyances Office? A. Yes.

Q. Have you Liber 310 of Conveyances there?

A. Yes, sir.

A. Will you please turn to page 5 and tell us what deed you find. I think you— Kindly read them in the record.

The COURT.—Liber 310?

Mr. ANDREWS.—Page 5. Simply read me the deed, please, that you find there.

A. (Reading:.) “Know all men by these presents that I, Mrs. Eliza Roy, of Kainaliu, North Kona,

(Testimony of James K. Aloï.)

Island, County and Territory of Hawaii, for and in consideration of the sum of one (1) dollar to me paid by my son, William F. Roy, the receipt whereof is hereby acknowledged, do hereby, grant, bargain, sell and convey unto said William F. Roy [71] all that certain fenced lot in Kawanui 2, North Kona, Island of Hawaii, being a portion of L. C. A. 8559 B, to W. C. Lunalilo, and described as follows—”

Mr. ANDREWS.—Unless your Honor wishes it, by consent of counsel we can omit the description of that land.

Mr. OLSON.—That is consented to.

Mr. ANDREWS.—Omit the description then and proceed.

A. (Reading:) “To have and to hold said granted premises, with the privileges and appurtenances thereunto belonging, unto said William F. Roy, his heirs and assigns forever, in witness whereof I have hereunto set my hand and seal this 31st day of July, A. D. 1908. Mrs. Eliza Roy, his cross-mark.” That is the—

Mr. ANDREWS.—The acknowledgment is by consent omitted.

Mr. OLSON.—That is correct.

Mr. ANDREWS.—Q. Now, after that, the next deed, will you please tell us what it is?

Mr. OLSON.—It is on page six.

Mr. ANDREWS.—Well, we will withdraw that question, if the Court please.

Q. Now, will you please turn to page 317—no liber 317 at page 9. A. Yes.

(Testimony of James K. Aloï.)

Q. Will you please read what you find there?

A. (Reading:) “This Indenture made this 30th day of March, A. D. 1909, by and between E. H. F. Wolter, trustee—”

Mr. ANDREWS.—No, no, that is a mistake; that is not the one we want. Is this 317?

A. 317, page 9.

Mr. ANDREWS.—No, 317, 151; excuse me. [72]

A. (Reading:) “Know all men by these presents that I, Eliza Roy, of Kawanui, North Kona, Island of Hawaii and Territory of Hawaii, for and in consideration of the sum of one dollar”—the dollar is spelled wrong here—

Q. Well, never mind; that means one dollar.

A. (Reading:) “To me paid by my son, William F. Roy, the receipt is hereby acknowledged, and for love and protection, do hereby grant, bargain, sell and convey and confirm unto the said William F. Roy, his heirs and assigns, all that portion of the land of Kawanui 2, in North Kona, Island of Hawaii, and bounded on the nauka side—”

Mr. ANDREWS.—Well, we will consent—

Mr. OLSON.—To the leaving out of the description.

Mr. ANDREWS.—Yes.

The COURT.—The description is omitted, then.

A. (Reading:) “To have and to hold the said granted premises, with all rights, easements, privileges and appurtenances thereunto belonging, unto the said William F. Roy, his heirs and assigns forever. And I do hereby, for myself, for my heirs,

(Testimony of James K. Aloï.)

executors, covenant with the said William F. Roy, his heirs and assigns, that I am seized in fee simple of the said granted premises; that they are free and clear of all encumbrances; that I will, and that my heirs, executors and administrators shall, warrant and defend the same unto the said William F. Roy, his heirs and assigns forever, against the lawful claims and demands of all persons, in witness whereof I have hereunto set my hand and seal this 23d day of October, A. D. 1909. Mrs. Eliza Roy, her cross-mark."

Mr. OLSON.—I will agree that it contains the acknowledgment and agree that it may be omitted from the record. [73]

Mr. ANDREWS.—Now, I will ask you to turn to page—Liber 355, on page 283.

A. (Reading:) "Know all men by these presents that I, Mrs. Eliza Roy, of Kāinaliū, North Kona, Island of Hawaii, and Territory of Hawaii, for and in consideration of the sum of one dollar to me paid by my son, William F. Roy, the receipt whereof is hereby acknowledged, and for love and affection, do hereby grant, bargain, sell, convey and confirm unto the said William F. Roy three acres and ninety-eight one hundredths of an acre of land in Kawanui 2d, North Kona, Hawaii, and being a part of Royal Patent Number 7455 and described as follows: Situated on the north side of Mrs. E. Roy's house lot—"

Mr. OLSON.—We will agree to omit the description.

The COURT.—So ordered.

(Testimony of James K. Aloï.)

A. (Reading:) "To have and to hold the said granted premises, together with all rights, easements, privileges and appurtenances thereunto belonging, unto the said William F. Roy, his heirs and assigns forever. And I do hereby, for myself and my heirs, executors and administrators, covenant with the said William F. Roy, his heirs and assigns, that I am lawfully seized in fee simple of the said granted premises, and that I will, and that my heirs, executors and administrators shall, warrant and defend the same unto the said William F. Roy, his heirs and assigns forever, against the lawful claims and demands of all persons. In witness whereof I, Mrs. Eliza Roy, have hereunto set my hand and seal this 13th day of October, A. D. 1911. Mrs. Eliza Roy, her cross-mark."

Mr. OLSON.—I admit that there is an acknowledgment that [74] appears and agree that it may be omitted from the record.

Mr. ANDREWS.—I now ask you to turn to Liber 371 on page 9. The last page was 283.

The COURT.—Of Liber 355.

Mr. ANDREWS.—Now, your liber is what?

A. Now, my liber is 371, page 9. This is the release by Mrs. Robinson. (Reading:) "Know all men by these presents, that whereas I, Caroline J. Robinson, am the holder of a mortgage on that tract of land known as Kawanui 2, North Kona, Hawaii, and whereas my mother, the owner of said tract, heretofore conveyed three portions of said tract to my brother, William F. Roy, by deeds dated and

(Testimony of James K. Aloï.)

recorded as follows, to wit: One, October 13, 1911, recorded in the office of the Registrar of Conveyances in Liber 355, on pages 283 and 284—”

The COURT.—That date is—

A. October 13, 1911.

The COURT.—All right, go ahead.

A. (Reading:) “Two, April 23, 1909, recorded in the office of the Registrar of Conveyances in Liber 317 on pages 151 and 152. Three, July 31st, 1908, recorded in the office of the Registrar of Conveyances in liber 310 and pages 5 and 6. Now, therefore, in consideration of the act of my mother in making these and other conveyances, and the sum of one dollar to me in hand paid by said William F. Roy, the receipt whereof is hereby acknowledged, I, the said Caroline J. Robinson, do hereby release and discharge said mortgage on the land described in the three aforesaid deeds, and I acknowledge full satisfaction of said mortgage as to the said three tracts of land. In witness whereof I have hereunto set my hand and seal on this 18th day of June, A. D. 1912, [75] Caroline J. Robinson.”

Mr. OLSON.—We admit that that is acknowledged and it appears in the record. That is the consent that has been referred to in the testimony of the witnesses.

Mr. ANDREWS.—I presume so. That is what I have offered it, for that purpose.

Mr. OLSON.—Let's have it understood that is so.

Mr. ANDREWS.—Yes.

(Testimony of James K. Aloï.)

Mr. OLSON.—That is understood, then?

Mr. ANDREWS.—Yes, as I understand it.

That is all; thank you.

Testimony of John D. Paris, for Defendants.

JOHN D. PARIS, a witness called on behalf of the defense, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. ANDREWS.)

Q. Mr. Paris, your name is John D. Paris, is it not? A. Yes.

Q. And what—was your wife a relation of Mrs. Eliza Roy?

A. She was a daughter of Mrs. Eliza Roy.

Q. And you knew Mrs. Roy during her lifetime, did you not? A. I did.

Q. Do you know a man named Thomas White?

A. I do.

Q. What relation was he, blood or by marriage, to Mrs. Roy? A. He married her daughter.

Q. And during the last 13 or 14 years where did Mr. Thomas White live?

A. Most of the time at Mrs. Roy's house.

Q. And his wife there, too?

A. They were both there most of the time. [76]

Q. There has been some testimony as to a telephone in the house, Mr. Paris. You were familiar with the house, were you not? A. I was.

Q. And the family? A. Yes, sir.

Q. Could you say who—for whose use that tele-

(Testimony of John D. Paris.)

phone was put in or by whom it was used?

Mr. OLSON.—Just a moment now; I object unless it is shown—

Mr. ANDREWS.—During the 12 or 13 years before Mrs. Roy's death?

Mr. OLSON.—I object to that, if the Court please, on the ground that there is no qualification shown.

The COURT.—Do you simply ask if he knows?

Mr. ANDREWS.—Yes.

A. Well, I know the telephone was in Mr.—

Mr. OLSON.—Don't give any testimony. You are asked if you know one way or the other.

A. Well, nothing further than the telephone in my house is supposed to be my telephone, and this telephone was in Mrs. Roy's house and was supposed to be her telephone.

Mr. ANDREWS.—All the family used it, did they not, to your knowledge?

Mr. OLSON.—I object.

Mr. ANDREWS.—Did all the family use it?

Mr. OLSON.—I object on the ground it is—

Mr. ANDREWS.—Q. To your knowledge?

Mr. OLSON.— —immaterial, has no tendency to prove any of the issues in this case.

The COURT.—If you get down to the conditions under which Mr. White was living there,—whether as member of the family [77] together with his wife, making their home there, whether they were paying board, whether they were paying rent, or whether they were simply conducting the house and having the mother-in-law live with them, or whether

(Testimony of John D. Paris.)

they were living with the mother-in-law or what,— I think that is the real substance of what we want to know.

Mr. ANDREWS.—All right, Mr. Paris, will you please tell me the—as your Honor has made a statement of what he considers the material facts—will you please tell me what you know of Mr. White's living at the house, Mrs. Roy's house; in what capacity did she live there, as explained by his Honor.

A. Well, of my own knowledge, all that I know he was living there, I think with that—Mrs. Roy as her son-in-law, and just what their—not as boarder, I don't think, but exactly how much he contributed towards the general family expenses, I don't know.

Q. If anything; do you know whether he contributed anything?

A. I think probably he did contribute something. I don't know positively of my own knowledge, but that is my idea, that he contributed some.

Q. And his wife was living there during all the time, was she not, with her mother?

A. As I said, most of the time they were at the mother's.

Q. To your knowledge did Mr. White use the phone while he was living there for business purposes?

A. Yes, I think he did. Indeed, I know he did.

Q. Is it not a fact that he conducted most of his business from the house during the time he lived with Mrs. Roy?

A. In the early—or his early years of staying

(Testimony of John D. Paris.)

there I think he did. Later on he went—when he became land agent [78] and had the business of the Bishop estate, he had an office in which he had an office phone.

Q. Can you tell me what year it was that he became agent for Bishop & Company, land agent?

A. I don't think I can. It seems to me the land agent—I have an idea was along in 1906, and the Bishop Estate—whether it was—I think a little before that time or a little after; I ain't quite sure; somewhere along there.

Q. And he lived up—and Mrs. White—he and Mrs. White lived with Mrs. Roy until Mrs. Roy's death?

A. Most of the time they had a beach house and also a cottage in the—on a piece of land that Mrs.—that they were—Mrs. Roy gave them.

Q. That Mrs. Roy gave them? A. Yes.

Mr. ANDREWS.—That's all.

Cross-examination.

(By Mr. OLSON.)

Q. Mr. Paris, Mr. and Mrs. Roy lived there at Mrs. Roy's house, did they not? A. Yes.

Q. That is, this house you have been speaking of where the telephone was, was Mrs. Roy's place, her house? A. He first was in a cottage.

Q Yes, but— A. In the yard.

Q. I mean the place where the telephone was; that was Mrs. Roy's home?

A. That is the main telephone, yes.

Q. That was Mrs. Roy's home? [79]

(Testimony of John D. Paris.)

A. That was Mrs. Roy's home, yes.

Q. Now, it is the fact, is it not, Mr. Paris, that the Whites, Mr. and Mrs. White,—she being Mrs. Roy's daughter, and Mr. White her son-in-law,—lived there with Mrs. Roy because Mrs. Roy wished them to do so, wished them to live there with her, isn't that so?

A. Well, I think that—I presume it was; I think so.

Q. And to a certain extent, to a large extent, Mrs. Roy being rather an elderly lady, wished to have them there and have Mr. and Mrs. White in a way sort of look out for her and her affairs?

A. Yes, that is true.

The COURT.—Who did the housekeeping, Mr. Paris?

A. Well, that is more than I can say. I think it was—exactly how it was divided among them I can't say.

Q. But you have been there hundreds of times, haven't you?

A. Yes. Well, Mrs. White, when there was a party or anything of that kind, or an entertainment, she took charge of it.

Q. If there were guests to entertain there, come either expectedly or unexpectedly, to be entertained there for the day or night or more, who was in charge of their entertainment?

A. Well, Mrs. Roy, if— It depended on what guests they were. If they were Mrs. Roy's friends, why, she generally took charge of the entertainment;

(Testimony of John D. Paris.)

if they were—that is, her old acquaintances and so on. If they were practically malihinis or people that perhaps had met Mrs. White or Mr. White, why they took the charge of them entirely.

Q. It was a case, was it not, where Mr. White married the daughter of the house and simply went in and hung up his hat? [80]

Mr. OLSON.—Oh, no, I object to that if the Court please, on the ground that it is not a fair comment.

The COURT.—I have asked the question, was that the situation. In other words, did he go there to live and to make that his home?

Mr. OLSON.—Now, if the Court please, that is a— With all due respect I think that all the evidence that has been introduced so far goes to show that Mr. White was living at this house more at Mrs. Roy's wish than his own.

(Argument.)

The COURT.—Q. Did he make that his home immediately after marriage?

A. He did. Well, not the place he went for a time; they went to Kekauhono and took charge of a small dairy that Mrs. Roy had up there, and the boys, and I don't exactly know how long they lived there, back and forth, and then came down to the main house, and the most of the time has—that has been their home.

Q. Was there any other daughter at home with Mrs. Roy? A. Mrs. Wall was at home.

Q. Yes; was she married at that time?

A. No, she was not.

(Testimony of John D. Paris.)

Q. Yes. Well, then, she married and moved away; Mrs.—the present Mrs. Wall married and moved away to live with her husband elsewhere?

A. She moved into another house, home of Mrs. Roy's, at Waiho.

Q. Yes; some distance away. Then was there any daughter left at that time?

A. No, there was not, after her marriage; she was the youngest of the family. [81]

Q. And that was the time, was it not, that Mrs. and Mr. White came back to live with the mother?

A. No, previous to that they had been there.

Q. Oh, yes, back before Mrs. Wall was married?

A. Yes.

Q. So that it was, as far as you could observe, the case of a married daughter continuing to live with her husband in her mother's home?

Mr. OLSON.—I object to the question on the ground that it assumes what the witness has testified—has not testified, he having testified that originally, when they were first married, that he did not live in the home.

The COURT.—Well, I am speaking now of the time after they did come home. I withdraw that question. I sincerely hope that nobody has taken offense at the expression I used, "went in and hung up his hat." I meant there was a home, that instead of taking his wife away he went into her home, as many do.

Q. Do you know, Mr. Paris, who paid the house-keeping bills there? I presume there were large

(Testimony of John D. Paris.)

grocery bills and such things as that; were they charged up to Mrs. Roy? A. I don't know.

Q. Or Mr. White?

A. Part of them, I presume—I know that Mrs. Roy paid part of them. I presume that Mr. White paid. I don't know what she paid; I know it was some of the bills that were paid shortly before her death or—for housekeeping expenses, I think, that were paid by Mrs. Roy, and also at different times there was—exactly how—what proportion I can't of my own knowledge say. [82]

Q. Do you know who ordered the telephone installed? A. I do not.

Q. Do you know whether it was installed before or after Mr. White's marriage; before or after he went there to live?

A. I think it was before. I am pretty positive it was.

The COURT.—Anything further, gentlemen? That's all.

Mr. OLSON.—Now, then, in regard to this matter, Mr. Paris. Mr. Paris, I understand that, outside of this thirteen hundred and sixty-eight dollars and odd cents, forty-five cents, I think it was, obligations in the total, of Mrs. Roy, which included the \$760 for telephone bills, I understand now that Mrs. Roy had incurred and owed just before her death, and paid just before her death, two or three other bills,—see if I am correct,—approximately one hundred dollars, somewhat more than one hundred, say one hundred flat to Hackfield & Company, sixty dol-

(Testimony of John D. Paris.)

dars to a man named Weisman, and about forty dollars to the Greenwells, was that correct?

A. Thereabouts, yes.

Q. That is in addition to the \$1,368.00?

A. Yes, a hundred—

Q. \$171.00 of Mr. White? A. Mr. White, yes.

Mr. ANDREWS.—They were all paid by Mrs. Roy?

Mr. OLSON.—Just before her death, wasn't it?

A. Yes, shortly before, two or three—probably two or three weeks, I think, before her death.

Q. Had they been running long?

A. I don't know exactly how long they had been running. There was some cattle sold and these amounts were paid. She [83] asked—she asked me to see these cattle were sold, sent for her son and were paid. I paid that for her and gave her the receipts.

Mr. ANDREWS.—That's all.

Mr. OLSON.—That's all.

That is our case, your Honor.

I HEREBY CERTIFY the above and foregoing to be a complete and accurate extension of my shorthand notes of the testimony taken in the above-entitled cause on June 1st, 1916, and June 2d, 1916.

JAMES L. HORNER,

Official Reporter.

[Endorsed]: L. 7950. 4/146. Caroline J. Robinson vs. Lorrin A. Thurston et al. Transcript. Filed at 3:50 o'clock P. M., Jany. 9th, 1917. B. H. Kahalepuna, Clerk.

No 993. Rec'd and filed in the Supreme Court
Jan. 19, 1917, at 2:50 o'clock P. M. Robert Parker,
Jr., Assistant Clerk. [84]

**Plaintiff's Exhibit "A"—Batch of Statements of
Account, etc.**

Law No. 7950. Plaintiff's Exhibit "A." Filed
Feb. 10, 1916. B. N. Kahalepuna, Clerk
Kealakekua,
~~Honolulu~~, H. T., July 25, 1912.

M—— Mrs. E. Roy.

THOMAS C. WHITE,
Kealakekua, Hawaii.

1912.

July 25. To telephone bill as per state-
ment attached.....\$768.00

L. N. 7950. Plaintiff's Exhibit "A." Filed
June 1, 1916. Huron K. Ashford, Clerk. [85]
Duplicate.

Holualoa, Hawaii; December 31, 1903.

Mrs. E. Roy (T. C. White)

To Kona-Kau Telephone and Telegraph Co., Dr.
L. S. AUNGST, Manager.

Bills Payable Quarterly in Advance.

1903.

Jan. 1. To balance due on account
rendered\$84 00

Mar. To rent of telephone for
quarter ended Mar, 31... 18 00

June. To rent of telephone for
quarter ended June 30.. 18 00

Sept. To rent of telephone for
quarter ended Sept. 30.. 18 00

Dec.	To rent of telephone for quarter ended Dec. 31...	18 00	156 00
	Cr.		
April.	Cash on account	50 00	
Sept.	do.	66 05	
Nov.	do.	21 95	138 00
		<hr/>	<hr/>
	To bal. due.....		18 00

[86]

Duplicate.

Hohualoa, Hawaii, December 31, 1904.

Mrs. E. Roy (T. C. White)

To Kona-Kau Telephone and Telegraph Co., Dr.

L. S. Aungst, Manager.

Bills Payable Quarterly in Advance.

1904.

Jan. 1.	To bal. due on account ren- dered	\$18 00	
Mar.	To rent of telephone for quarter ended Mar. 31...	18 00	
June.	To rent of telephone for quarter ended June 30...	18 00	
Sept.	To rent of telephone for quarter ended Sept. 30...	18 00	
Dec.	To rent of telephone for quarter ended Dec. 31....	18 00	90 00
	Cr.		
June.	Cash on account.....	36 00	
July.	do.	18 00	
Nov.	do.	18 00	72 00
		<hr/>	<hr/>
	To bal. due.....		18 00

[87]

Duplicate.

Holualoa, Hawaii, December 31, 1905.

Mrs. E. Roy (T. C. White)

To Kona-Kau Telephone and Telegraph Co., Dr.

L. S. Aungst, Manager.

Bills Payable Quarterly in Advance.

1905.

Jan. 1.	To bal. due on account rendered	\$18 00	
Mar.	To rent of telephone for quarter ended Mar. 31 ...	18 00	
June.	To rent of telephone for quarter ended June 30 ...	18 00	
Sept.	To rent of telephone for quarter ended Sept. 30...	18 00	
Dec.	To rent of telephone for quarter ended Dec. 31....	18 00	90 00
	Cr.		

Jan.	Cash on account.....	18 00	
July.	do.	36 00	
Dec. 31.	do.	36 00	90 00
	Paid in full to date.		

[88]

Duplicate.

Holualoa, Hawaii, December 31, 1906.

Mrs. E. Roy (T. C. White)

To Kona-Kau Telephone and Telegraph Co., Dr.

L. S. Aungst, Manager.

Bills Payable Quarterly in Advance.

1906.

March.	To rent of telephone for quarter ended Mar. 31..	\$18 00
--------	--------------------------------------------------	---------

June.	To rent of telephone for quarter ended June 30...	18 00	
Sept.	To rent of telephone for quarter ended Sept. 30...	18 00	
Dec.	To rent of telephone for quarter ended Dec. 31....	18 00	72 00
	Cr.		
June 30.	Cash on account.....	18 00	
Oct. 17.	do.	18 00	
Dec. 13.	do.	18 00	54 00
			<hr/>
	To bal. due.....		18 00

[89]

Duplicate.

Holualoa, Hawaii, December 31, 1907.

Mrs. E. Roy (T. C. White)

To Kona-Kau Telephone and Telegraph Co., Dr.

L. S. Aungst, Manager.

Bills Payable Quarterly in Advance.

1907.

Jan. 1.	To bal. due or account ren- dered	\$18 00	
Mar.	To rent of telephone for quarter ended Mar. 31...	18 00	
June.	To rent of telephone for quarter ended June 30...	18 00	
Sept.	To rent of telephone for quarter ended Sept. 30...	18 00	
Dec.	To rent of telephone for quarter ended Dec. 31....	18 00	90 00
	Cr.		

Feb. 23.	Cash on account.....	18 00	
May 11.	do.	18 00	
July 31.	do.	18 00	
Dec. 31.	do.	18 00	72 00
		<hr/>	<hr/>
To bal. due.....			18 00

[90]

Duplicate.

Holualoa, Hawaii, December, 1908.

Mrs. E. Roy (T. C. White)

To Kona-Kau Telephone and Telegraph Co., Dr.
L. S. Aungst, Manager.

Bills Payable Quarterly in Advance.

1908.

Jan. 1.	To bal. due on account rendered	\$18 00	
Mar.	To rent of telephone for quarter ended Mar. 31...	18 00	
June.	To rent of telephone for quarter ended June 30 ...	18 00	
Sept.	To rent of telephone for quarter ended Sept. 30...	18 00	
Dec.	To rent of telephone for quarter ended Dec. 31....	18 00	90 00

Cr.

Jan. 31.	Cash on account.....	18 00	
April 30.	do.	18 00	
Oct. 31.	do.	18 00	54 00
		<hr/>	<hr/>
To balance.....			36 00

[91]

Duplicate.

Holualoa, Hawaii, December 31, 1909.

Mrs. E. Roy (T. C. White)

To Kona-Kau Telephone and Telegraph Co., Dr.

L. S. Aungst, Manager.

Bills Payable Quarterly in Advance.

1909.

Jan. 1.	To bal. due on account rendered	\$36 00	
Mar.	To rent of telephone for quarter ended Mar. 31..	18 00	
June.	To rent of telephone for quarter ended June 30..	18 00	
Sept.	To rent of telephone for quarter ended Sept. 30..	18 00	
Dec.	To rent of telephone for quarter ended Dec. 31...	18 00	108 00
	Cr.		
June 30.	Cash on account.....	36 00	
Dec. 31.	do.	54 00	90 00
	To bal. due.....		18 00

[92]

Duplicate.

Holualoa, Hawaii, December 31st, 1910.

Mrs. E. Roy (T. C. White)

To Kona-Kau Telephone and Telegraph Co., Dr.

L. S. Aungst, Manager.

Bills Payable Quarterly in Advance.

1910.

Jan. 1.	To bal. due on account ren- dered	\$18 00
---------	--------------------------------------------	---------

Mar.	To rent of telephone for quarter ended Mar. 31...	18 00	
June.	To rent of telephone for quarter ended June 30...	18 00	
Sept.	To rent of telephone for quarter ended Sept. 30...	18 00	
Dec.	To rent of telephone for quarter ended Dec. 31....	18 00	90 00
	Cr.		
April 30.	Cash on account.....	36 00	
Sept. 30.	do.	36 00	72 00
	To bal. due.....		18 00

[93]

Duplicate.

Holualoa, Hawaii, December 31, 1911. 190

Mrs. E. Roy (T. C. White)

To Kona-Kau Telephone and Telegraph Co., Dr.

L. S. Aungst, Manager.

Bills Payable Quarterly in Advance.

1911.

Jan. 1.	To bal. due on account ren- dered	\$18 00	
Mar.	To rent of telephone for quarter ended Mar. 31...	18 00	
June.	To rent of telephone for quarter ended June 30 ...	18 00	
Sept.	To rent of telephone for quarter ended Sept. 30...	18 00	
Dec.	To rent of telephone for quarter ended Dec. 31...	18 00	90 00
	Cr.		

Jan. 31.	Cash on account.....	18 00	
May 31.	do.	18 00	
July 31.	do.	18 00	
Oct. 31.	do.	18 00	72 00
			<hr/>
	To bal. due.....		18 00

[94]

Duplicate.

Holualoa, Hawaii, June 30, 1912. 190

Mrs. E. Roy (T. C. White)

To Kona-Kau Telephone and Telegraph Co., Dr.

L. S. Aungst, Manager.

Bills Payable Quarterly in Advance.

1912.

Jan. 1.	To bal. due on account rendered	\$18 00	
Mar.	To rent of telephone for quarter ended Mar. 31...	18 00	
June.	To rent of telephone for quarter ended June 30...	18 00	54 00
	Cr.		

March 31. Cash on account..... 36 00

June 30. do. 18 00 54 00

Paid in full to date.

\$768.00.

K-K. T. T. Co.

L. S. AUNGST.

[Endorsed]: 500. L. 7950. [95]

L. No. 7950. Plaintiff's Exhibit "A." Filed June 1, 1916. Huron K. Ashford, Clerk.

*In the Circuit Court of the First Judiciary Circuit,
Territory of Hawaii.*

ASSUMPSIT—L. 7950.

CAROLINE J. ROBINSON,

Plaintiff,

vs.

LORRIN A. THURSTON et al., Executors,

Defendants.

**Transcript of the Testimony of Thomas C. White,
Taken before the Honorable T. B. Stuart, Third
Judge of the Circuit Court of the First Judicial
Circuit, Territory of Hawaii, on Thursday, Feb-
ruary 10, 1916.**

The COURT.—Is this the case that you have been talking about?

Mr. OLSON.—This is the case, if the Court please, where we were to take Mr. White's testimony, because of the fact that he is in town and wants to return on to-morrow's boat.

The COURT.—Who are you for?

Mr. OLSON.—I am for the plaintiff, and Mr. Andrews is for the defendant. The witness is for the plaintiff.

The COURT.—Now on this day come the parties in this case, and this case is called for trial and it is suggested that the evidence of Mr. White be now taken before this Court, and used upon the trial of the cause. You are not able to get through with the whole trial?

(Testimony of Thomas C. White.)

Mr. OLSON.—No, as we explained to your Honor yesterday, Mr. Paris, one of the defendants, is a necessary witness for Mr. Andrews, and to a certain extent for us also; and his wife was too ill in their home to permit of their coming down Tuesday. [96]

The COURT.—Now, the Court proceeds to take the evidence of said witness White,—what is his name?

Mr. OLSON.—Thomas C. White.

(Mr. Olson makes brief statement of the case.)

Direct Examination of THOMAS C. WHITE.

(By Mr. OLSON.)

Q. Mr. White, your name is Thomas C. White?

A. Yes.

Q. Where do you reside?

A. Kainaliu, Kona, Hawaii.

Q. Island of Hawaii? A. Island of Hawaii.

Q. How long have you resided there?

A. Fifteen years.

Q. Did you know Eliza Roy who lived on the Island of Hawaii in her lifetime?

A. Yes, I married her eldest daughter.

Q. You were her son in law?

A. Son in law,—she was my mother in law.

Q. She is now deceased, is she not? A. Yes.

Q. Having died on the 29th day of August, 1912?

A. Yes.

Q. I will ask you, Mr. White, if, at the time of Mrs. Roy's death, Mrs. Roy was indebted to you in any amount whatever? A. Yes, she was.

Q. Will you state how that indebtedness arose?

(Testimony of Thomas C. White.)

A. By paying bills at her request, and the bill was itemized as a whole—the bills were itemized as a whole and sworn to and presented to the executors of the Eliza Roy Estate.

Q. You filed a claim with the executors?

A. I filed a claim. [97]

Q. I will hand you this lot of documents which are attached together, purporting to be an itemized statement and receipt dated July 25, 1912, and I will ask you if that is a correct statement of the amounts which you had paid out on behalf of Mrs. Roy at her request, and if that is the total amount there which was owing by her to you at the time of her death, for bills paid by you at her request?

A. It was, and the bill made out and given to the executors of the will of Eliza Roy is a copy of this.

Mr. OLSON.—I ask that that be allowed in evidence.

Mr. ANDREWS.—Subject to our examination as to certain items, we have no objection to it being allowed at this time.

The COURT.—It will be allowed in evidence and marked Exhibit “A,” and the sheets will be marked 1, 2, 3, 4 and 5.

Mr. OLSON.—Q. Does that statement, Mr. White, that has just been put in evidence as Plaintiff’s Exhibit “A,” correctly set forth the amount of the bills which you paid at the request of Mrs. Roy?

A. Yes.

Q. Had you been repaid at the time of Mrs. Roy’s death any part of that sum of \$768, as shown by this

(Testimony of Thomas C. White.)

statement? A. I had not.

Q. Was Mrs. Roy at the time of her death indebted to you in any other or further sums? A. No.

Q. Had she been at any time shortly previous to her death? A. Yes.

Q. About—for what?

A. For moneys lent her at different times.

Q. By you? A. Yes. [98]

Q. Over what period of years?

A. Well, I don't quite remember now; it is several years. Mr. Paris paid that on account, leaving this balance.

Q. When you say several years, what do you mean—about three or four years would you say?

A. I guess all of that.

Q. And how much did that amount to?

A. Amounted to one hundred seventy and some odd dollars—I don't know just what the right figures are. If I had known that this was going to be taken up, I might have brought my book down to show you the exact figures Mr. Paris paid. He paid it by check.

Q. Was it more or less than \$175?

A. Around that somewhere—around that,—a little bit more.

Q. A little bit more—but you don't know the exact amount?

A. Might have been \$178, somewhere around that; I cannot give you the exact figures.

Q. Was it at least \$175? A. Yes.

Q. And when did you say that was paid?

(Testimony of Thomas C. White.)

A. That was paid about a month or five weeks before Mrs. Roy died, somewhere around there. That was paid in check, and Mrs. Roy requested Mr. Paris to pay this bill here—to settle that in cattle.

Q. That is, in what way was it to be settled in cattle?

A. Mr. Paris asked me to drive the cattle,—I was driving up mauka—mauka is the upper lands,—and Mr. Paris asked me if we would bring in Mrs. Roy's cattle so he and I could put a price on it and take out this debt. Mrs. Roy was very anxious to have it settled, but Mr. Paris had to come to Honolulu on business, and as long as he wasn't there, we [99] could not put a price on them. The morning he left, that he was coming to Honolulu, he told me he was coming down on business and wouldn't be able to put any price on the cattle, and he asked me if I wouldn't turn them out again, which I did.

Q. Was Mr. Paris acting for Mrs. Roy?

A. Yes, sir; she asked him to pay the debts.

Mr. ANDREWS.—I move to strike it out as hearsay—all the conversation as to Mrs. Roy's anxiety to pay it.

Mr. OLSON.—Before that is ruled on, I will ask the witness about it.

Q. Did you hear Mrs. Roy make that statement?

A. I was right in the room with Mr. Paris when she told him.

Mr. ANDREWS.—Well, my objection is raised to the conversation between Mr. Paris and Mr. White.

Mr. OLSON.—The witness has stated that Mr.

(Testimony of Thomas C. White.)

Paris was acting for Mrs. Roy, and consequently it simply explains,—it has no real bearing on the issues, except it explains why it was not paid as Mrs. Roy asked Paris to pay it. (Argument.)

Mr. OLSON.—Q. Mr. White, when was this conversation?

The COURT.—Do I understand that you yield to the objection?

Mr. OLSON.—No; I think the next question will show just exactly what Mrs. Roy said, and what this witness heard her say, so it will make it unnecessary to rule upon this objection. Mr. Andrews can renew the objection later if he desires to do so.

Mr. ANDREWS.—This not being a jury case, I can always argue to your Honor.

The COURT.—Yes. The Court will take the objection, so far as made, under advisement.

Mr. OLSON.—Q. When did this conversation that you refer to [100] take place with Mrs. Roy and Mr. Paris, where you were present?

A. You mean the date?

Q. Yes, approximately? A. I don't know.

Q. Well, approximately? A. Well, this was—

Q. How long before her death?

A. It is hard to say,—must have been, I am not sure whether it was just before he paid that check of that other account or whether it was just after.

Q. About that time, was it?

A. It was about that time, when she asked him.

Q. Where did the conversation take place?

A. In her bedroom.

(Testimony of Thomas C. White.)

Q. In Mrs. Roy's bedroom? A. Yes.

Q. In her house? A. Yes.

Q. Who were present at that conversation?

A. Mr. Paris was there; Willie Roy,—of course, he is dead; Mrs. Robinson; Mrs. White was there—

Q. Your wife? A. Yes.

Q. And yourself?

A. I myself; there were several, there were quite a few in the room; I don't remember just now who those were. Mrs. Robinson heard Mrs. Roy—

Q. That is unimportant—just follow my questions, please,—now just what did Mrs. Roy state with reference to this bill of yours, or this account of yours, for bills paid by you at her request,—what did she say?

A. The account that Mr. Paris paid, or this standing account?

Q. This \$768 account? [101]

A. She says,—well, she spoke to Paris—"John, you get my pipis together—

Q. What are pipis? A. Pipis are cattle.

Q. Yes.

A. —"and you fix a price on it,—you and Tommie fix a price and settle that account. I want it settled now. It has been running for years and Tommie has kokuaed me with this money and I want it settled—kokuaed is to help.

Q. Now, then, was the account settled in cattle in the way that Mrs. Roy requested it to be done?

A. No.

(Testimony of Thomas C. White.)

Q. And why not,—have you given the reason already?

A. Mr. Paris,—on account of Mr. Paris having to come to Honolulu, he couldn't put a price on the cattle. I had them at Waihou.

Q. Was any settlement made of it thereafter,—this plan of settlement having fallen through, was any settlement made of it? A. On this account?

Q. Yes. A. No.

Q. I will ask you whether or not this bill or this claim of yours as shown by this account, was owing by Mrs. Roy to you at the time that the \$175 or \$178 that you have already referred to, was paid?

A. Yes.

Q. It was owing to you at the same time?

A. Yes, Mr. Paris told me in my office that he would—

Q. Never mind, don't say anything about Mr. Paris, that is unimportant,—I think that is all.
[102]

Cross-examination of THOMAS C. WHITE.
(By Mr. ANDREWS.)

Q. Mr. White, these purport to be charges of telephone bills; that is correct (showing witness bills)?

A. Yes.

Q. In Kona? A. Yes.

Q. Were they due for Mrs. Roy's house?

A. Mrs. Roy's telephone.

Q. Not your own?

A. No, I have mine in my office.

Q. I see the first date is 1903, January 1st, balance

(Testimony of Thomas C. White.)

due on account rendered, \$74,—that is prior to January 1, 1903? A. Yes.

Q. Some balance?

A. Well, \$6 a month, and telephone is \$6 a month, and I paid that \$84, all of that, for Mrs. Roy. She asked me if I wouldn't help her and pay her telephone bill.

Q. What I am trying to get at is this \$84 was for some time at \$6 a month, prior to January 1st, 1903?

A. Yes.

Q. That would go back how many months?

A. That is fourteen months.

Q. So that the original bill of which this charge was a part was a debt incurred in 1901—when did you make these payments—from time to time?

A. Yes; you will see the credit dates here.

Q. That was \$138 paid in 1903? A. Yes.

Q. That is correct, is it not?

A. Yes, leaving a balance.

Q. Leaving a balance of \$186? A. Yes. [103]

Q. In 1904, according to this, you paid \$72?

A. Yes.

Q. And so on according to these balances here?

A. Yes.

Q. That is correct, is it? A. Yes.

Q. You had no written instrument requesting you or authorizing you to pay her bills—it was simply a verbal arrangement with her?

A. Yes, she couldn't write.

Q. So did she ask you to pay these bills for her or did you as her son in law pay them?

(Testimony of Thomas C. White.)

A. She asked me to pay them.

Q. And you never made any effort to collect until she died?

A. I never intended to present this bill. She was sick on her deathbed, and I never intended to present this bill at all. It was at her request. Mr. Paris and her son William Roy were in there with her, and she called me from the office and said: "Tommie, I want you—you have been kokuaing me with this telephone bill all these years. I want you to make out that bill," and I went out and waited for several days before I drew it up. I was very much surprised that she should ask that. She said that if she didn't have the bill now and could see it and acknowledge it, why I would have to bring it against her estate after her death. And so I had the bill all fixed up and I presented it to her. And Mr. Paris and them were there, and they saw the bill, and Mr. Paris said: "Mother," her says, "is this right"? And she asked him how much it was and the different items, that is, the dates,—about when—what date it ran from,—and she said: "Yes, that is a correct bill"; "and John," she said, "I want it paid." I said, "Mother, I never expected to present this bill to you at all; I [104] don't know why it is you have asked me for it"; and then that is when she told me I might present it after her death against her estate; and she acknowledged it and she turned to Mr. Paris, and she said, "John, I had another item—another item of that account, of that money"—I mean cash that I lent her, and she asked him to settle the whole account and to get her

(Testimony of Thomas C. White.)

cattle and see if she had enough to settle it, and that is how the conversation between Mr. Paris and her and I came about,—and he could not possibly come up because he was called to Honolulu on some law case.

Q. You did not consider this a charge against Mrs. Roy until she asked you to make it out?

A. She asked me for the account and said she owed that bill and wanted it settled, because I had been helping her all those years with that account.

Q. Then when you had paid these moneys, you had not paid them with the intention of charging her with it, but you paid them to help her out?

A. I paid them for her account. It was an account,—indebtedness that she incurred with the telephone people which I paid at her request.

Q. And did you intend to charge it to her?

A. She—

Q. Did you, when you made this bill, intend to charge it to Mrs. Roy?

A. At the time I did, yes; at the time I did and just when she was so sick I didn't want to bother with any bill, and I wasn't going to present it at all.

Q. Then you want to change your testimony when you said you never wanted to charge her?

A. I never intended at the last to present this bill to her at all. [105]

Q. But through all these years from 1901 on, you never had presented her with a bill at all?

A. No. I never had presented her with a bill.

The COURT.—In whose name was the contract

(Testimony of Thomas C. White.)

with the Telephone Company?

Mr. ANDREWS.—In Mr. White's and Mrs. Roy's. It says, "Mrs. E. Roy," and in parentheses, "T. C. White."

WITNESS.—He put my name on because he looked to me for the money for Mrs. Roy's.

Mr. ANDREWS.—That is all, Mr. White.

Redirect Examination of THOMAS C. WHITE.
(By Mr. OLSON.)

Q. Just a moment; does this statement which has been admitted in evidence here as Exhibit "A," show the dates of the payments by you on account, cash on account? A. Yes.

Q. And those are correctly set forth, are they?

A. Yes; and those can be checked up on the telephone books.

The COURT.—You say the charges are made against her?

Mr. ANDREWS.—Presumably, as far as we can see.

Mr. OLSON.—Q. These are bills of Mrs. Roy's?

A. Those are bills of Mrs. Roy's; they are on the books, Mrs. Roy. When I paid it, he put my name on it, because she asked me to pay it for her. My own telephone account is different from that; I have my office telephone.

Mr. OLSON.—That is all.

Mr. ANDREWS.—I wish to make a motion; in fairness I think it ought to be made now to protect any rights we may have. I move that all the items on this bill, admitted payments by Mr. White prior

(Testimony of Thomas C. White.)

to six years, for six years prior to the [106] death of Mrs. Roy, to wit, the 29th day of August, 1912, be not allowed on the ground of the statute of limitations.

Mr. OLSON.—If the Court please, this is a running account, right along, paid quarterly by Mr. White,—a running account is never barred as long as the account continues to run.

Mr. ANDREWS.—I do not see that it is a running account. These are voluntary payments made by Mr. White without any contract from Mrs. Roy, or writing.

Mr. OLSON.—It does not make any difference whether it was writing or not. Mrs. Roy requested Mr. White to pay these bills when they became due, and that is a running account if anything could be; continues to run until the account is closed. Now, then, this shows that that account was finally closed out in 1912, up to the time of her death, as a matter of fact; and then another thing is this,—according to the testimony Mrs. Roy acknowledged the indebtedness just before her death.

WITNESS.—May I say a word, Judge?

The COURT.—Yes.

WITNESS.—When Paris paid that \$170,—I gave him a receipt on account; balance due, \$768.

(Argument.)

Mr. ANDREWS.—I am perfectly willing that should be submitted to your Honor when we argue the entire matter, because I have a question of law in this case that will come up before we go into this,

(Testimony of Thomas C. White.)

and I do not want to argue it piecemeal, but I want to do this to preserve my rights.

The COURT.—I will not rule on your objection now, Mr. Andrews. I will know more about the case when I come to [107] try it. I am rather inclined to think that this is a running account,—that is the way I feel now; runs along regularly through these months from year to year, right straight along; no break in it, I guess. Well, is that all?

Mr. OLSON.—That is all.

The COURT.—I will reserve the ruling on the objection. When do we take up this case again?

Mr. OLSON.—I think that will depend entirely on how soon Mr. Paris can get to Honolulu. Of course, both Mr. and Mrs. Paris are rather heavily interested.

The COURT.—The case is continued to a date hereafter to be fixed. [108]

I hereby certify that the foregoing is a full, true and correct transcript of my shorthand notes, taken upon the hearing of the evidence of Thomas C. White, a witness in the above-entitled cause, on Thursday, February 10, 1916.

ELLEN K. DWIGHT,
Official Shorthand Reporter, First Circuit Court.
Honolulu, Hawaii, May 25, 1916.

[Endorsed]: L. 7950. L. No. 7950. Plaintiff's Exhibit "A." Filed June 1, 1916. Huron K. Ashford, Clerk. No. 993. Rec'd and filed in the Supreme Court Jan. 19, 1917, at 2:50 o'clock P. M. Robert Parker, Jr., Assistant Clerk. 21. [109]

Plaintiff's Exhibit "B"—Release, Dated November 27, 1905, Caroline J. Robinson to Mrs. Eliza Roy.

THIS AGREEMENT made this twenty-seventh day of November by and between Caroline J. Robinson of Honolulu, Territory of Hawaii, and Eliza Roy, widow of W. F. Roy of Kona, Island of Hawaii,

WITNESSETH:

WHEREAS the said Eliza Roy is indebted to the said Caroline J. Robinson in the following sums:

1. On Promissory Note of W. F. Roy and Eliza Roy dated July 23, 1895, with interest at the rate of 8% per annum\$ 125.
Amount of interest to date..... 103.33
2. On Promissory Note signed by W. F. Roy dated Sept. 23, 1884, and assumed by said Eliza Roy, with interest at the rate of 9% per annum from March 23, 1889..... 2,000.
Amount of interest to date..... 3,000.
The same being secured by mortgage of real estate dated Sept. 23, 1884 and recorded in the Registry of Deeds in Honolulu, in Book 91 on pages 411-413.
3. On Note of Eliza Roy dated July 31, 1886, with interest at the rate of 9% per annum from July 31, 1889, the same being secured by mortgage of real estate dated July 31, 1886, recorded in the Registry of Deeds in

said Honolulu in Book 99, on pages	
488-489	3,750.
Amount of interest to date	5,512.50
Total amount of Principal and in-	
terest as of November 23, 1905	\$14,490.83

AND WHEREAS the said Caroline J. Robinson has agreed [110] to cancel and release the said indebtedness and the said notes and mortgages and to release the said Eliza Roy from said indebtedness and all claim under said notes and mortgages on the terms and conditions hereinafter contained; and the said Eliza Roy has agreed to said terms and conditions:

NOW, THEREFORE, in consideration of the premises and of the sum of Ten Dollars (\$10) to the said Caroline J. Robinson paid by the said Eliza Roy, the receipt whereof by the said Caroline J. Robinson is hereby acknowledged and in further consideration of the covenants and agreements of the said Eliza Roy hereinafter contained the said Caroline J. Robinson doth hereby acknowledge full payment and settlement of said indebtedness, principal and interest, hereinabove set forth and doth hereby release the same and cancel and discharge the said notes and mortgages;

PROVIDED, HOWEVER, that if the said Eliza Roy shall at any time hereafter mortgage or sell any of her real estate or shall incur indebtednesses amounting at any one time to the sum of One Thousand Dollars (\$1,000) and upwards without the consent in writing of the said Caroline J. Robinson,

then and in any such case this acknowledgment of payment of said indebtedness and said release and cancellation and discharge of said notes and mortgages shall be null and void and of no effect and said enumerated indebtednesses and interest thereon shall immediately become due and payable by the said Eliza Roy, her heirs, executors, administrators and assigns to the said Caroline J. Robinson, her heirs, executors, administrators and assigns with interest thereon at the several rates aforesaid, in the same manner as though this acknowledgment of payment and release of said notes and mortgages had not been made.

The said Eliza Roy in consideration of the foregoing agreements on the part of said Eliza Roy, for herself, her heirs, [111] executors, administrators and assigns doth hereby covenant and agree with the said Caroline J. Robinson, her heirs, executors, administrators and assigns that she will not, without the approval in writing of the said Caroline J. Robinson, sell or mortgage any of her lands or incur any indebtednesses in excess at any one time, of the sum of One Thousand Dollars (\$1,000).

And the said Eliza Roy doth hereby acknowledge that the said enumerated indebtednesses and interest thereon as hereinabove set forth are now due and payable to the said Caroline J. Robinson and doth hereby agree that in case of the violation by her of her said above agreement and covenant, or any part thereof, then and in such case the said indebtedness, principal and interest shall be and become immediately due and payable to the said Caroline J. Robin-

son, her heirs, executors, administrators and assigns, in the same manner as though this acknowledgment of payment and release had not been made.

IN WITNESS WHEREOF the said parties hereto have hereunto set their hands and seals the day and year first above written.

CAROLINE J. ROBINSON.

her

ELIZA ROY.

X

mark

Witness:

L. A. THURSTON.

[Endorsed]: Copy. Release. Caroline J. Robinson to Mrs. Eliza Roy. Dated November 27, 1905.

L. No. 7950. Plaintiff's Exhibit "B." Filed June 1, 1916. Huron K. Ashford, Clerk.

No. 993. Rec'd and filed in the Supreme Court Jan. 19, 1917, at 2:50 o'clock P. M. Robert Parker, Jr., Assistant Clerk. 22. [112]

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1916.

ERROR TO CIRCUIT COURT, FIRST
CIRCUIT.

No. 993.

CAROLINE J. ROBINSON

vs.

LORRIN A. THURSTON and JOHN D. PARIS,
Executors Under the Will of ELIZA ROY,
Deceased.

Opinion.

Hon. C. W. ASHFORD, Judge.

Argued April 30, 1917. Decided June 15, 1917.

ROBERTSON, C. J., QUARLES and COKE, JJ.

Contract—release on condition subsequent.

The release of an existing debt upon conditions subsequent merely suspends the right of action thereon until such time, if ever, the event contemplated occurs. The release will be avoided if the conditions are not complied with.

Same—illegal contract not to be enforced by court.

A party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out; nor can he set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim. Courts of justice will never recognize or uphold any transaction which in its object, operation or tendency is calculated to be prejudicial to the public welfare.

Same—void as against public policy.

The state has a general interest in the freedom of its people in the exercise of their legal and normal rights and any contract that is subversive of those rights [113] without any benefit to the restrainer is against public policy.

Same—same.

A contract which attempts to restrain another from incurring indebtedness in the sum of one thousand dollars and upwards without limit as to time or place, without benefit to the coven-

antee, is an unreasonable restraint of trade and void because against public policy.

Pleading—rule of court.

A rule of court requiring a defendant to give notice that the defense of illegality will be relied upon does not apply where the illegality appears upon the face of the plaintiff's complaint. [114]

OPINION OF THE COURT BY COKE, J.

(ROBERTSON, C. J., Dissenting.)

The defendants are the executors of the will of Eliza Roy, deceased, who died on or about August 29, 1912. The plaintiff is a daughter of Eliza Roy. On November 27, 1905, and for a long time prior thereto, Eliza Roy was indebted on three separate promissory notes which were at that date owned and held by plaintiff. The total amount of indebtedness on these several obligations amounted, in principal and interest, to \$14,490.83, the greater part of which was accumulated interest. On that date the plaintiff and Eliza Roy entered into an agreement respecting said indebtedness, in which agreement Eliza Roy acknowledged the indebtedness of \$14,490.83 as due from her to the plaintiff Caroline J. Robinson, and the said Caroline J. Robinson, in consideration of the sum of ten dollars and in further consideration of the covenants and agreements of Eliza Roy set forth in the agreement, acknowledged full payment and settlement of the indebtedness upon the proviso that if Eliza Roy should at any time thereafter mortgage or sell any of her real estate or incur indebtedness amounting at any one time to the sum of one thousand dollars

and upwards, without the consent in writing of Caroline J. Robinson, then and in such case the acknowledgment of payment of said indebtedness, and the release and cancelation and discharge of said notes would be null and void and of no effect, and the said indebtedness would thereby become immediately due and payable. As this case turns entirely upon the agreement made between Eliza Roy and plaintiff, the same is set forth in full as follows, to wit:

“This agreement made this twenty-seventh day of November by and between Caroline J. Robinson of Honolulu, Territory of Hawaii, and Mrs. Eliza Roy, widow of W. F. Roy of Kona, Island of Hawaii, Witnesseth:

“Whereas the said Eliza Roy is indebted to the said Caroline J. Robinson in the following sums:” (Here the notes are separately listed and described.) [115]

“Total amount of principal and interest as of November 23, 1905, \$14,490.83.

“And Whereas the said Caroline J. Robinson has agreed to cancel and release the said indebtedness and the said notes and mortgages and to release the said Eliza Roy from said indebtedness and all claims under said notes and mortgages on the terms and conditions hereinafter contained; and the said Eliza Roy has agreed to said terms and conditions;

“Now therefore in consideration of the premises and of the sum of Ten Dollars (\$10) to the said Caroline J. Robinson paid by the said Eliza Roy, the receipt whereof by the said Caroline

J. Robinson is hereby acknowledged and in further consideration of the covenants and agreements of the said Eliza Roy hereinafter contained the said Caroline J. Robinson doth hereby acknowledge full payment and settlement of said indebtedness, principal and interest, hereinabove set forth and doth hereby release the same and cancel and discharge the said notes and mortgages;

“Provided however that if the said Eliza Roy shall at any time hereafter mortgage or sell and of her real estate or shall incur indebtedness amounting at any one time to the sum of One Thousand Dollars (\$1,000) and upwards without the consent in writing of the said Caroline J. Robinson, then and in any such case this acknowledgment of payment of said indebtedness and said release and cancellation and discharge of said notes and mortgages shall be null and void and of no effect and said enumerated indebtedness and interest thereon shall immediately become due and payable by the said Eliza Roy, her heirs, executors, administrators and assigns to the said Caroline J. Robinson, her heirs, executors, administrators and assigns with interest thereon at the several rates aforesaid, in the same manner as though this acknowledgment of payment and release of said notes and mortgages had not been made.

“The said Eliza Roy in consideration of the foregoing agreements on the part of said Eliza Roy, for herself, her heirs, executors, adminis-

trators and assigns doth hereby covenant and agree with the said Caroline J. Robinson, her heirs, executors, administrators and assigns that she will not, without the approval in writing of the said Caroline J. Robinson, sell or mortgage any of her lands or incur any indebtedness in excess, at any one time, of the sum of One Thousand Dollars (\$1,000).

“And the said Eliza Roy doth hereby acknowledge that the said enumerated indebtedness and interest thereon as hereinabove set forth are now due and payable to the said Caroline J. Robinson and doth hereby agree that in case of the violation by her of her said above agreement and covenant, or any part thereof, then and in such case the said indebtedness, principal and interest shall be and become immediately due and payable to the said Caroline J. Robinson, her heirs, executors, administrators and assigns, in the same manner as though this acknowledgment of payment and release had not been made.

“In Witness Whereof the said parties hereto have hereunto set their hands and seals the day and year first above written.

“CAROLINE J. ROBINSON,

her

“ELIZA ROY.

X

mark.

“Witness:

“L. A. THURSTON.”

It is conceded that this agreement was executed November 27, 1905. [116]

After the death of Eliza Roy the plaintiff duly presented to the defendants, as executors aforesaid, her claim under and in respect of said promissory notes, demanding payment thereof. This claim having been rejected by defendants plaintiff commenced her action in the circuit court for recovery of said claim, alleging in her complaint, in substance, that said notes had become due to plaintiff by reason of the fact that after the execution of the agreement of November 27, 1905, and prior to her death, "said Eliza Roy did sell and convey certain portions of her real estate without the consent of the said plaintiff, and did, without the consent of plaintiff, incur indebtedness amounting in the aggregate at one time to more than one thousand dollars."

The defendants answered denying generally all of the allegations of the complaint and gave notice that among other defenses they intended to rely upon the defense of payment, statute of frauds and the statute of limitations. Shortly thereafter defendants filed an amended answer admitting some of the allegations of the complaint and generally denying the allegations not so admitted, and further setting up as a defense that all of plaintiff's claims against Eliza Roy were fully paid and settled by the agreement dated November 27, 1905, and that all of said claims were barred by the statute of limitations. Upon the issues thus formed the cause went to trial before the circuit court of the first circuit without a jury, the right to a trial by jury having been waived by both parties. At the conclusion of the case the trial court rendered a decision in which it found as a fact that

Eliza Roy, prior to her death and after the execution of said agreement of November 27, 1905, did incur indebtedness at one time to an aggregate amount of more than one thousand dollars.

The trial court held, however, that under the provisions of said agreement the claims of plaintiff were totally released and discharged; that the clause in said agreement which [117] acknowledged full payment and satisfaction of the indebtedness and released, canceled and discharged the notes, constituted a complete liquidation thereof; that the same became utterly and absolutely extinguished and could have no further existence as a legal obligation. The trial court adopted the law as expressed in the case of *Tyson v. Dorr*, 6 Whart. (Pa.) 255, and gave judgment in favor of defendants and plaintiff comes here on a writ of error.

The plaintiff abandoned her claim that Eliza Roy violated the provisions of the agreement against the alienation of her property without the written consent of the plaintiff and now relies solely upon the alleged violation of that part of the agreement which prohibited Mrs. Roy from incurring indebtedness at any one time in the sum of one thousand dollars or upwards without the written consent of plaintiff. Thus the issues are narrowed down to a consideration of this single clause in the agreement. The trial court having found that Mrs. Roy, subsequent to the date of the agreement and prior to her death, did incur indebtedness at one time in the sum of one thousand dollars and upwards, we are unwilling to disturb this conclusion, although the evidence was,

to say the least, not overly strong. It appears from the evidence that after Mrs. Roy's death various debts which she is alleged to have incurred while living were brought to light, amounting in all to the sum of \$1,386.45. The greater portion of this indebtedness was made up of a telephone bill which amounted to \$768. This bill had been paid by her son-in-law in instalments from time to time and had been running for more than ten years. The son-in-law testified that he never intended to present the bill and that the same was first mentioned while Mrs. Roy was on her deathbed, at which time, it is claimed, she acknowledged the bill and directed that it be paid by her representative. The weakness of the evidence respecting this alleged indebtedness was, perhaps, in a large measure cured by admissions of counsel for defendants made during the trial. [118]

The record now before us discloses that the first note herein referred to was dated in 1884, the second in 1886 and the third in 1895. The last payment made on any of said notes was in the year 1889. The principal of said notes amounts to the sum of \$5,875 and the interest now claimed amounts to \$12,707. From these facts the statute of limitations would appear to have run against the several obligations long prior to the execution of the agreement between Mrs. Roy and the plaintiff in 1905. There may have been promises to pay or other acts on the part of Mrs. Roy which would have revived the obligations prior to the making of said agreement. Upon this subject the record is entirely silent.

We disagree with the decision of the trial court holding that the effect of the agreement was a complete release and discharge of the indebtedness and that "a man cannot release a personal action as an obligation with a condition subsequent, but the condition will be void, for a personal action once suspended is extinguished forever." The ancient case of *Tyson v. Dorr*, *supra*, cited in support of this doctrine, has long since been discarded and the modern rule is that a release of an existing debt with conditions subsequent merely suspends the right of action thereon until such time, if ever, the event contemplated occurs.

"A release may also be subject to a condition subsequent; and in that case the release will be avoided if the condition is not complied with."

2 Addison on Contracts, Pt. 2, p. 836.

"It is not and never was, true that in no mode and under no circumstances can a personal action be suspended."

Belshaw v. Bush, 11 C. B. 201.

"There are also cases in the books where a contract having been broken, and a cause of action having accrued thereon, a new contract between the debtor and creditor and additional parties, creating new rights and liabilities, has been made and accepted as a conditional accord and satisfaction and discharge of the cause of action, so that if the new contract is carried out by the new parties in all its integrity, the [119] original cause of action is extinguished and gone forever; and if it is not fully carried out

the party is remitted to his original right of action upon the original contract.”

2 Addison on Contracts, Pt. 2, p. 838.

See also *Newton v. Levy*, 6 L. R. C. P. 180.

“We * * * think it would be most unjust for a debtor to be allowed to take advantage of a release only granted on a condition he has not performed.”

Hall v. Levy, 10 L. R. C. P. 154.

There is another phase of this case which, while almost wholly ignored in the court below and in the briefs and argument of counsel before this court, demands consideration, and that is the question of the validity of the clause in the agreement between Eliza Roy and plaintiff herein restraining Eliza Roy from incurring indebtedness at any one time to the amount of one thousand dollars or upwards without the written consent of plaintiff. Under other circumstances we might feel constrained to ignore all questions not properly urged for our consideration by counsel. But in this case the agreement is before us and plaintiff can only prevail upon its strength and validity. If we find that the condition in the agreement, for the violation of which plaintiff must depend solely for judgment in this case, is for any reason void, we conceive it to be our duty to so declare.

“No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out; nor can he set up a case in

which he must necessarily disclose an illegal purpose as the groundwork of his claim.”

9 Cyc. 546.

See also *Pocahontas Coke Co. v. Powhatan Coal & Coke Co.*, 56 S. E. 264.

“Under the principles relating to the doctrine of public policy, as applied to the law of contracts, courts of justice will never recognize or uphold any transaction which in its object, operation or tendency is calculated to be prejudicial to the public welfare.”

6 R. C. L. 712.

“Whether a contract is against public policy is a question of law for the court.”

9 Cyc. 483.

The clause in the agreement hereinabove set out attempted to restrain Eliza Roy from incurring indebtedness at any one time in the sum of one thousand dollars or upwards [120]. without plaintiff's written consent. This restraint is without bounds or limit either as to place or duration. At no time during her life and at no place and under no circumstances could Eliza Roy incur the indebtedness unless with the consent of plaintiff without committing a breach of the condition in the agreement. Occasions might arise where it would be of great advantage to Mrs. Roy and to her estate for her to exercise the right to incur indebtedness in the amount mentioned. An emergency might occur during her lifetime, caused by sickness or otherwise, whereby her self-preservation would demand the exercise of this right. And on the other hand, wherein lay the

benefit to plaintiff by reason of this extraordinary and unusual restraint upon the legal rights of Mrs. Roy, to wit, the right to trade upon her credit? It might be said that plaintiff, being a daughter of Mrs. Roy, would, in the event she died intestate, become one of the heirs of her estate and that for this reason she had an interest in the conservation of her mother's property. We deem this consideration altogether too remote. Mrs. Roy might have made a will prior to her death devising her property to her other children or even to strangers, in which event the plaintiff would have no interest in the property of which her mother died possessed. See *Kalaniana'ole v. Liliuokalani*, *ante*, 457, 472. Then how could plaintiff suffer by the breach of the contract? As a matter of fact Mrs. Roy might, by the exercise of her right to incur indebtedness, have greatly enhanced the value of her estate.

Ch. J. Parker, in *Mitchel v. Reynolds*, 1 P. Wms. 181, said: "A particular restraint is not good without a just reason and consideration."

"The * * * question is, whether this is a reasonable restraint of trade. And we do not see how a better test can be applied to the question whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party *in favour of whom it is given*, and not so large as to interfere with the interests of the [121] public. *Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either*, it can only be oppres-

sive; and if oppressive, it is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void, on the grounds of public policy."

Horner v. Graves, 151 Eng. Rep. 287; 6 R. C. L. p. 789.

The growth of commerce and the usages of trade demand the free exercise of the right to extend credit and to have credit extended; to enjoy the right to borrow as well as the right to lend; and unless there appears some clear and positive benefit to accrue to the covenantee by reason of the subversion of these rights a contract to that effect will be held an unreasonable restraint of trade and void because against public policy.

"Every restraint of trade which is larger than what is required for the necessary protection of the party with whom the contract is made is unreasonable and void, as injurious to the interests of the public on the ground of public policy."

Mallan v. May, 11 Mee. & W. 653. See also 63 Am. Dec. 384.

The state has a general interest in the freedom of its people in the exercise of their legal and natural rights and any contract that tends to curtail those rights without any benefit to the restrainer is against public policy. The right to borrow has been recognized for ages. The commerce of the world is conducted largely on credit, and while the disposition to incur indebtedness may in some instances prove harmful, yet the right to borrow is universally

recognized as a valuable privilege often indulged, and not infrequently to the great benefit and advantage of the borrower. It is not an over-statement to say that countless firms and individuals, and even nations, are constantly being saved from financial wreck and disaster by timely recourse to this privilege.

“If an agreement binds the parties or either of them, or if the consideration is, to do something opposed to the public policy of the state or nation, it is illegal and absolutely void, however solemnly made. If a court should enforce such agreements it would employ its functions in undoing what it was created to do.”

9 Cyc. 481.

“Any stipulation, agreement or contract which forbids the debtor from discharging his obligation by borrowing the money, in whole or in part, except from the creditor, is subversive of the rights of the citizen, injurious to the general welfare of the public and is therefore void on the high ground of public policy.”

Union Cent. Life Ins. Co. v. Champlin, 65
Pac. 836. [122]

While the facts of the case just cited are entirely dissimilar to those of the case at bar, yet the principles of law therein enunciated have application here.

We are of the opinion that the clause in the agreement referred to, which attempted to restrain Eliza Roy from incurring indebtedness to the amount at any one time of one thousand dollars or over with-

out the consent of plaintiff herein, constituted an abnegation of her legal rights, without benefit to plaintiff, was an unreasonable restraint of trade and is therefore void on the ground of public policy. It follows that, the condition being void, an action based upon a breach thereof could not be maintained. The reasons advanced by the trial court for its decision in favor of the defendants were erroneous, but the conclusions are correct and will therefor not be disturbed.

Notley v. Notley, *ante*, p. 724.

The judgment of the Circuit Court is affirmed.

C. H. OLSON and M. B. HENSHAW (HOLMES & OLSON, with them on the Brief), for Plaintiff in Error.

ANDREWS & PITTMAN, for Defendants in Error.

JAMES L. COKE. [123]

CONCURRING OPINION OF QUARLES, J.

I concur in the conclusion and reasoning of the opinion written by Mr. Justice Coke. The theory of the plaintiff as set forth in her complaint is that the notes sued on and the mortgages securing them were released by the agreement of November 27, 1905, such release subject to defeasance upon the happening of either of two conditions subsequent, viz., the alienation of any of her real estate or the incurring of indebtedness to the extent of one thousand dollars at any one time by Mrs. Roy without the written consent of the plaintiff. The plaintiff relies upon the happening of the last condition subsequent

as defeating the release and reviving her cause of action upon the notes sued on here. The agreement is pleaded by plaintiff in effect and copies attached to and made a part of plaintiff's complaint, and the questions upon which the decision here rests are raised in and appear upon the face of the complaint. If the agreement as to the conditions subsequent is not valid and binding, but, on the other hand, is void for the reason that such conditions subsequent are contrary to public policy the complaint shows no cause of action and it is not necessary to plead their illegality or to give notice thereof. The rule of the circuit court requiring notice that the defense of illegality will be relied on was not intended to apply to such defense when it appears upon the face of the complaint. The plaintiff must plead a valid and legal contract. The conditions of defeasance being contrary to public policy and void, and so shown upon the face of the complaint, no question of evidence is involved, the only question being, is the plaintiff entitled to judgment upon her own showing? The trial court held that she was not on the ground that the notes sued on were released by said agreement. The conclusion of the trial court was correct. To hold otherwise would be equivalent to holding that plaintiff is entitled [124] to judgment by reason of a contract against public policy, thereby giving the consent of the court to the enforcement of such contract. In my opinion the court cannot do so and the judgment appealed from should be affirmed.

DISSENTING OPINION OF ROBERTSON, C. J.

I concur in the ruling made that the circuit court erred in holding that the plaintiff could not recover because, as supposed, a release of a personal obligation upon condition subsequent must as matter of law operate as an absolute release. But I must dissent from the further ruling that the judgment should be affirmed on the ground that the condition subsequent was against public policy and void, and that the release, therefore, was an absolute one. Rule 4 of the rules of the Circuit Court of the first circuit provides that "no defendants shall be allowed to set up" certain defenses, including the defense of illegality, "unless he shall, on filing his answer, give notice within his answer or at the foot thereof, of his intention to rely upon the same." The point that the contract is illegal was not raised in the trial court by demurrer, answer or otherwise, nor have the appellees urged it in this court. But it is said that the condition of the release is in and of itself contrary to public policy, and that it is the duty of this court upon its own motion to decline to enforce it. The principal opinion seems to concede, however, that if the provision as to incurring indebtedness in excess of \$1,000 was a "benefit" to the plaintiff, or if she might "suffer by the breach" of the contract, or if it was a "reasonable restraint," or if the restraint was not "larger than what was required for the necessary protection" of the obligee, it would not render the condition invalid. Yet, by affirming the judgment of the Circuit Court, this court precludes

the plaintiff from the opportunity of showing, if she could, that the restraint was reasonable, or that the condition was a benefit to her and that she would suffer by its breach. She is practically denied her day in court on that matter. The case of *Notley v. Notley*, cited in the principal opinion, was an equity appeal, the [126] entire case was before this court upon the facts as well as the law, and the conclusion of this court was based upon evidence contained in the record. This case seems to be decided upon a lack of evidence upon a point which was not agitated in the trial court.

I think the agreement in question is not illegal upon its face because of the condition referred to. Public policy is more concerned with the enforcement of private contracts than it is with defeating them. The Supreme Court of the United States in *B. & O. R. Co. v. Voight*, 176 U. S. 498, 505, said, "At the same time it must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts, than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appear that they contravene public right or the public welfare." In *Printing etc. Co. v. Sampson*, L. R. 19 Eq. 462, 465, Sir George Jessel, M. R., said, "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is

that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice." In 9 Cyc. 542, it is said, "And one may agree not to do what he has a legal right to do, even though the promise may be restrictive of his personal rights." And see, *Brooks v. Cooper*, 50 N. J. E. 761, 767; *Collister v. Hayman*, 183 N. Y. 250, 256; *Mosler Safe Co. v. Safe Dep. Co.*, 199 N. Y. 479, 485; *Waite v. Merrill*, 4 Greenl. 102. In *Daley v. People's B. L. & [127] S. Assn.*, 178 Mass. 13, 19, it was said, "Courts are less and less disposed to interfere with parties making such contracts as they choose, so long as they interfere with no one's welfare but their own."

Wherein an agreement made with her daughter by an elderly lady living upon her own means and upon her own premises in a country district, who does not appear to have been engaged in any business, trade or profession, upon a valuable and adequate consideration, that she will not incur indebtedness at any one time in excess of \$1,000, is unreasonable, oppressive, immoral, or detrimental to public interests or welfare, I humbly confess my inability to see.

A. G. M. ROBERTSON.

[Endorsed]: No. 993. Supreme Court Territory of Hawaii. October Term, 1916. *Caroline J. Robinson v. Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased.* Opinion. Filed June 15, 1917, at 2:20 P. M. J. A. Thompson, Clerk. [128]

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1916.

ERROR TO THE CIRCUIT COURT, FIRST
CIRCUIT.

CAROLINE J. ROBINSON,

Plaintiff in Error,

vs.

LORRIN A. THURSTON, and JOHN D. PARIS,
Executors Under the Will of ELIZA ROY,
Deceased,

Defendants in Error.

Judgment.

This cause coming on to be heard at the October, 1916, Term of the Supreme Court on writ of error to the Circuit Court of the First Judicial Circuit, jury waived, Messrs. Holmes & Olson and M. B. Henshaw, Esq., appearing for plaintiff in error, and Messrs. Andrews and Pittman appearing for defendants in error, was duly submitted, and the Supreme Court having on the 15th day of June, 1917, filed a written opinion holding that the assignments of error should not be sustained and that the judgment of said Circuit Court in said cause should be affirmed.

IT IS HEREBY ORDERED AND ADJUGED that the said judgment of said Circuit Court herein be and is hereby affirmed, with costs.

Dated, Honolulu, T. H., June 21, 1917.

By the Supreme Court:

[Seal]

J. A. THOMPSON,

Clerk of the Supreme Court of the Territory of
Hawaii.

O. K.—COKE.

[Endorsed]: No. 993. In the Supreme Court of
the Territory of Hawaii. Caroline J. Robinson,
Plaintiff in Error, vs. Lorrin A. Thurston and John
D. Paris, Executors Under the Will of Eliza Roy,
Deceased, Defendants in Error. Judgment. Filed
June 21, 1917, at 9:42 A. M. J. A. Thompson, Clerk.
[129]

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1916.

MONDAY, APRIL 30, 1917.

Court convened at 10:00 o'clock A. M.

Present on the Bench: Hon. A. G. M. ROBERT-
SON, C. J., Hon. R. P. QUARLES and Hon. J.
L. COKE, JJ.

ERROR TO CIRCUIT COURT, FIRST CIR-
CUIT.

S. C. No. 993.

To page 293.

CAROLINE J. ROBINSON

vs.

LORRIN A. THURSTON, and JOHN D. PARIS,
Executors Under the Will of ELIZA ROY,
Deceased.

**Minutes of the Clerk of the Supreme Court, Under
Dates of April 30 and June 15, 1917.**

HEARING.

Appearances:

C. H. OLSON, of the Firm of HOLMES & OLSON,
and M. B. HENSHAW, for Plaintiff-Appellant.

L. ANDREWS and W. B. PITMAN, for Defendants-Appellees.

The above-entitled cause being in order and the same having been set for this day for hearing, when the court convened and said cause was called Mr. Henshaw proceeded to state the case and then followed with his argument concluding at 10:50 A. M.

At 10:51 A. M., Mr. Pittman commenced with his argument, concluding at 11:15 A. M., and he was followed by Mr. Andrews who concluded at 11:30 A. M.

At 11:31 A. M., Mr. Olson commenced with his argument concluding at 12:15 P. M. [130]

Mr. Henshaw replied concluding at 12:25 P. M.

The Court directed counsel to file briefs on the question whether or not the agreement between Mrs. Roy and Mrs. Robinson, signed in November, 1905, is an agreement in restraint of alienation and void as against public policy.

Briefs to be in for defendants seven days hence, those for the plaintiff seven days thereafter, and the reply to be in three days after the second brief.

At 12:25 P. M. the court adjourned until 10:00 o'clock next Wednesday morning, May 2.

J. A. THOMPSON,
Clerk Supreme Court.

FRIDAY, JUNE 15, 1917.

ERROR TO THE CIRCUIT COURT, FIRST
CIRCUIT.

S. C. No. 993.

From page 270.

CAROLINE J. ROBINSON

vs.

LORRIN A. THURSTON and JOHN D. PARIS,
Executors Under the Will of ELIZA ROY,
Deceased.

At 2:20 o'clock P. M. this day the Court handed down its written opinion in the above-entitled cause affirming the judgment of the Circuit Court. ROBERTSON, C. J., dissenting.

J. A. THOMPSON,
Clerk Supreme Court. [131]

**(Rule 4 of the Rules of the Circuit Court, First
Circuit, Territory of Hawaii.)**

RULE 4.

Defenses in Personal Actions Specially Pledged.

In personal actions, the statute of limitations shall be specially pleaded; and no defendant shall be allowed to set up by way of defense to the plaintiff's claim, any illegality, fraud, release, payment, infancy, coverture, or discharge under any statute relating to bankruptcy or insolvency unless he shall, on filing his answer, give notice within his answer or at the foot thereof, of his intention to rely upon the same. [132]

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1916.

CAROLINE J. ROBINSON,

Plaintiff in Error,

vs.

LORRIN A. THURSTON and JOHN D. PARIS,

Executors Under the Will of ELIZA ROY,

Deceased,

Defendants in Error.

Petition for Writ of Error and Supersedeas Returnable to United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable the Chief Justice of the Supreme Court of the Territory of Hawaii:

Caroline J. Robinson, the plaintiff in error in the above-entitled cause, deeming herself aggrieved by the judgment of the Supreme Court of the Territory of Hawaii, entered and filed on the 21st day of June, 1917, in the above-entitled cause, entitled "Caroline J. Robinson, plaintiff in error, vs. Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, deceased, defendants in error," comes now, by Henry Holmes and Clarence H. Olson, her attorneys, and hereby humbly petitions said Supreme Court of the Territory of Hawaii for an order allowing the said Caroline J. Robinson, said plaintiff in error, to prosecute a writ of error and have the same allowed from the United States Circuit Court of Appeals for the Ninth Circuit to said Supreme Court of the Territory of Hawaii under and accord-

ing to the laws [133] of the United States in that behalf made and provided, and that a transcript of the record, proceedings and documentary exhibits upon which said judgment was made, duly authenticated, may be sent to said United States Circuit Court of Appeals for the Ninth Circuit, and also that an order may be made by this Honorable Court fixing the amount of the bond which the said plaintiff in error shall give and furnish upon the said writ of error, and that upon the filing of such bond, all proceedings in and relating to the subject-matter in and of the said cause in the said Supreme Court of the Territory of Hawaii and in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, whether direct or ancillary thereto, be suspended and stayed until the determination of such writ of error by the said United States Circuit Court of Appeals for the Ninth Circuit.

And in this behalf your petitioner shows that the said judgment was rendered in an action at law and that the amount involved in said action, exclusive of costs, exceeds the value of \$5,000.00.

WHEREFORE, your petitioner prays that a writ of error may issue out of this Court to the end that the errors existing in the record may be corrected and the said judgment reversed, and judgment given to the said plaintiff in error and full and complete justice may be done in the premises.

Dated, Honolulu, T. H., August 8th, 1917.

CAROLINE J. ROBINSON,
Said Petitioner.

By HENRY HOLMES,
CLARENCE H. OLSON,
Her Attorneys. [134]

Territory of Hawaii,
City and County of Honolulu,—ss.

Caroline J. Robinson, of the City and County of Honolulu, Territory of Hawaii, being first duly sworn, upon her oath, deposes and says:

That she is the plaintiff in error in the above-entitled cause, and is well acquainted with the matters in controversy in said cause, and that the amount involved in the said cause, exclusive of costs, exceeds the value of \$5,000.00.

CAROLINE J. ROBINSON.

Subscribed and sworn to before me this 8th day of August, 1917.

[Seal] FLORENCE LEE,
Notary Public, First Judicial Circuit, Territory of Hawaii. [135]

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1916.

CAROLINE J. ROBINSON,
Plaintiff in Error,
vs.

LORRIN A. THURSTON and JOHN D. PARIS,
Executors Under the Will of ELIZA ROY,
Deceased,
Defendants in Error.

**Order Allowing Writ of Error Returnable to U. S.
Circuit Court of Appeals and Supersedeas.**

Upon reading and filing the foregoing petition for a writ of error together with an assignment of errors

presented therewith, alleged to have occurred in the judgment of this Court and in the proceedings in the trial of said cause prior thereto;

IT IS ORDERED that a writ of error be and the same is hereby allowed to the said Caroline J. Robinson, to have reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered in the above-entitled cause and the proceedings in the trial of said cause prior thereto, and that the amount of bond on said writ of error be, and the same is hereby fixed in the sum of FIVE HUNDRED DOLLARS (\$500.00); and that upon the filing by said above-named plaintiff in error of an approved bond in said amount, all further proceedings in said cause in the said Supreme Court of the Territory of Hawaii and the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, shall be stayed and suspended until the determination of such writ of error by the said United States Circuit Court of Appeals for the Ninth Circuit.

[Seal] A. G. M. ROBERTSON,
Chief Justice Supreme Court for the Territory of Hawaii.

Dated at Honolulu, Territory of Hawaii, this 8th day of August, 1917. [136]

[Endorsed]: No. 993. Supreme Court of the Territory of Hawaii. October Term, 1916. Caroline J. Robinson, Plaintiff in Error, vs. Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased, Defendants in Error. Petition for Writ of Error and Supersedeas Returnable to United States Circuit Court of Appeals for the

Ninth Circuit, and Order Allowing Same. Filed August 8, 1917, at 12:05 P. M. J. A. Thompson, Clerk. [137]

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1916.

CAROLINE J. ROBINSON,

Plaintiff in Error,

vs.

LORRIN A. THURSTON and JOHN D. PARIS,
Executors Under the Will of ELIZA ROY,
Deceased,

Defendants in Error.

**Assignments of Error on Return to Writ of Error
Returnable to United States Circuit Court of
Appeals for the Ninth Circuit.**

Comes now Caroline J. Robinson, the plaintiff in error in the above-entitled cause, by Henry Holmes and Clarence H. Olson, her attorneys, and says that in the record and proceedings in the above-entitled cause in the Supreme Court of the Territory of Hawaii, and in the rendition of its final judgment therein, there are, and have intervened, manifest errors prejudicial to the said plaintiff in error, to wit:

I.

That the said Supreme Court erred in affirming the judgment of the Circuit Court of the First Circuit of the Territory of Hawaii in said cause.

II.

That the said Supreme Court erred in not reversing the said judgment of the said Circuit Court and

in not deciding that judgment should be entered in favor of the said plaintiff in error as prayed in her bill of complaint in said cause. [138]

III.

That the said Supreme Court erred in holding and deciding that the agreement, a copy of which is attached to said bill of complaint, marked Exhibit "D," and made a part of said complaint, which said agreement was allowed in evidence in said cause was an absolute release of the promissory notes sued upon in said cause.

IV.

That the said Supreme Court erred in holding and deciding that the condition and proviso in said agreement, providing that if Eliza Roy, one of the parties to said agreement, should at any time after the date of said agreement incur indebtedness amounting at any one time to the sum of One Thousand Dollars (\$1,000.00) and upwards without the consent in writing of the said plaintiff in error, then and in such case the acknowledgment of payment of said promissory notes and the release and cancellation and discharge of said notes contained in said agreement should be null and void and of no effect, and the said promissory notes and the interest thereon should immediately thereon become due and payable by said Eliza Roy, her heirs, executors, administrators and assigns, to the said plaintiff in error, in the same manner as though said acknowledgment of payment and release contained in said agreement had not been made, was an unreasonable restraint of trade and void.

V.

That the said Supreme Court erred in holding and deciding that the said condition and proviso in said agreement was against public policy. [139]

VI.

That the said Supreme Court erred in not holding and deciding that the said condition and proviso in said agreement was reasonable and void.

VII.

That the said Supreme Court erred in holding and deciding that the incurring of indebtedness by said Eliza Roy, amounting at one time to more than \$1,000.00, which said indebtedness was found and held to have been incurred by said Eliza Roy after the execution of said agreement and the date thereof, did not immediately make the indebtedness enumerated in said agreement with interest thereon as provided in said agreement, become due and payable by said Eliza Roy, her executors or administrators, to said plaintiff in error.

VIII.

That the said Supreme Court erred in not holding and deciding that the said indebtedness incurred by said Eliza Roy immediately made the indebtedness enumerated in said agreement with interest thereon as provided in said agreement, become due and payable by said Eliza Roy, her executors or administrators, to said plaintiff in error.

IX.

That the said Supreme Court erred in not entering judgment in favor of the said plaintiff in error and against the said defendant in error, directing the said Circuit Court of the First Judicial Circuit to

enter judgment in favor of the said plaintiff in error and [140] against said defendants in error as prayed in said bill of complaint.

X.

That the said Supreme Court erred in not holding and deciding that the said condition and proviso in said agreement was valid, and that upon the breach thereof by said Eliza Roy by incurring indebtednesses amounting at one time to more than the sum of \$1,000.00, the promissory notes enumerated in said agreement, with interest thereon as provided in said agreement, became immediately due and payable by said Eliza Roy, her executors or administrators, to the said plaintiff in error.

XI.

That the said Supreme Court erred in holding and deciding that the defendants in error were not barred from the defense of illegality of said agreement, by reason of their failure to raise the said defense by demurrer, answer or any other pleading or otherwise, or to give notice of the same in any way, in said Circuit Court, or to urge or raise the same in any way in said Supreme Court.

XII.

That the said Supreme Court erred in not holding and deciding that the defendants in error were barred from the defense of illegality of said agreement, by reason of their failure to raise the said defense by demurrer, answer or any other pleading or otherwise, or to give notice of the same in any way, in said Circuit Court, or to urge or raise the same in any way in said Supreme Court. [141]

XIII.

That the said Supreme Court erred in holding and deciding that the defendants in error were not barred from the defense of illegality of said agreement by reason of their failure to give notice of their intention to rely upon the same, as required by rule 4 of the Rules of the said Circuit Court, which said Rule 4 reads as follows:

“In personal actions, the statute of limitations shall be specially pleaded; and no defendant shall be allowed to set up by way of defense to the plaintiff’s claim, any illegality, fraud, release, payment, infancy, coverture, or discharge under any statute relating to bankruptcy or insolvency, unless he shall, on filing his answer, give notice within his answer or at the foot thereof, of his intention to rely upon the same.”

XIV.

That the said Supreme Court erred in not holding and deciding that the defendants in error were barred from the defense of illegality of said agreement by reason of their failure to give notice of their intention to rely upon the same, as required by said Rule 4 of the said Rules of the said Circuit Court.

XV.

That the said Supreme Court erred in holding and deciding that the errors were not committed and did not intervene in the proceedings in the said cause in said Circuit Court and in the rendition of the judgment in said Circuit Court, as assigned by said plaintiff in error upon and in support of the writ

of error in said cause from the said Supreme Court to the said Circuit Court.

WHEREFORE the said plaintiff in error prays that for the errors aforesaid, and other errors appearing in [142] the record of said Supreme Court in the said cause to the prejudice of the plaintiff in error, the judgment of said Supreme Court be reversed, annulled and for naught esteemed, and that the said Supreme Court be ordered to reverse the said judgment entered in said Circuit Court and to order the said Circuit Court to enter judgment in favor of the plaintiff in error as by her prayed, and for such other relief as may be just and proper in the premises, to the end that justice may be done in the premises.

Dated Honolulu, T. H., August 8th, 1917.

CAROLINE J. ROBINSON,

Plaintiff in Error,

By HENRY HOLMES,

CLARENCE H. OLSON,

Her Attorneys. [143]

[Endorsed]: No. 993. Supreme Court, Territory of Hawaii. October Term, 1916. Caroline J. Robinson, Plaintiff in Error, vs. Lorrin A. Thurston and John D. Paris, Executors under the Will of Eliza Roy, Deceased, Defendants in Error. Assignment of Errors on Return to Writ of Error Returnable to United States Circuit Court of Appeals for the Ninth Circuit. Filed August 8, 1917, at 12:05 P. M. J. A. Thompson, Clerk. [144]

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1916.

CAROLINE J. ROBINSON,

Plaintiff in Error,

vs.

LORRIN A. THURSTON and JOHN D. PARIS,

Executors Under the Will of ELIZA ROY,

Deceased,

Defendants in Error.

**Supersedeas and Cost Bond on Writ of Error
Returnable to U. S. Circuit Court of Appeals.**

KNOW ALL MEN BY THESE PRESENTS:
That we, Caroline J. Robinson, as principal, and Fidelity and Deposit Company of Maryland, a corporation, as surety, are held and firmly bound unto Lorrin A. Thurston and John D. Paris, Executors under the will of Eliza Roy, deceased, in the sum of FIVE HUNDRED DOLLARS (\$500.00), to the payment whereof, well and truly to be made, we do hereby jointly and severally firmly bind ourselves and our respective heirs, successors, executors and administrators.

THE CONDITION of this obligation is as follows:

WHEREAS, in an action at law heretofore pending in and before the Supreme Court of the Territory of Hawaii, wherein said bounden principal was plaintiff in error, and obligees were defendants in error, the said Supreme Court did, on the 21st day of June, 1917, order, render and enter a judgment of said Supreme Court, wherein and whereby there was and is affirmed a certain judgment theretofore, to wit, the 18th day of July, 1916, rendered and entered

in and by the Circuit Court for the First Circuit of said Territory, in a cause wherein said bounden principal was plaintiff, [145] and said obligees were defendants, and which said judgment was in favor of said defendants; and whereas said bounden principal has applied for, and is about to sue out, a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to said Supreme Court of the Territory of Hawaii to the end that the judgment of the said Supreme Court, above described, may be reviewed by said United States Circuit Court of Appeals for the Ninth Circuit, and has taken, or is about to take, such further and other proceedings as may be necessary to obtain a review by said United States Circuit Court of Appeals for the Ninth Circuit of the judgment last aforesaid;

NOW, THEREFORE, if the said bounden principal shall prosecute said writ of error to effect, and shall answer all damages and costs if she fails to make her plea good, then the above obligation shall be void, otherwise to remain in full force and effect.

IN WITNESS WHEREOF, the said principal has set her hand and seal, and the said surety has caused its name and corporate seal to be set, hereunto this 8th day of August, 1917.

CAROLINE J. ROBINSON,
FIDELITY AND DEPOSIT COMPANY OF
MARYLAND,

By ARTHUR BERG,
Attorney in Fact,
By JAMES MACCONEL, (Seal)
Agent,

Surety.

The foregoing bond is hereby approved as to form and sufficiency, this 8th day of August, 1917.

[Seal] A. G. M. ROBERTSON,
Chief Justice, Supreme Court of the Territory of
Hawaii. [146]

[Endorsed]: No. 993. Supreme Court, Territory of Hawaii. October Term, 1916. Caroline J. Robinson, Plaintiff in Error, vs. Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased, Defendants in Error. Supersedeas and Cost Bond on Writ of Error, Returnable to U. S. Circuit Court of Appeals. Filed August 8, 1917, at 12:05 P. M. J. A. Thompson, Clerk. [147]

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1916.

CAROLINE J. ROBINSON,

Plaintiff in Error,

vs.

LORRIN A. THURSTON and JOHN D. PARIS,
Executors Under the Will of ELIZA ROY,
Deceased,

Defendants in Error.

**Writ of Error to the Supreme Court of the Territory
of Hawaii.**

The United States of America,—ss.

The President of the United States to the Honorable
Justices of the Supreme Court of the Territory
of Hawaii, GREETING:

Because in the record and proceedings, as also in

the rendition of the judgment of a plea which is in the said Supreme Court of the Territory of Hawaii, before you, or some of you, between Caroline J. Robinson, plaintiff in error, and Lorrin A. Thurston and John D. Paris, executors under the will of Eliza Roy, deceased, defendants in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by their complaint appears:

We being willing that error, if any there hath been, shall be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth [148] Circuit, together with this writ, so that you have the same in the said United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, State of California, within thirty (30) days from the date hereof, that, the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Ninth Circuit may cause further to be done therein to correct that error, what of right, according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 8th day of August, in the year of our Lord one thousand nine hundred and seventeen.

[Seal]

J. A. THOMPSON,

Clerk of the Supreme Court of the Territory of Hawaii.

The foregoing is hereby allowed this 8th day of August, 1917.

[Seal]

A. G. M. ROBERTSON,
Chief Justice of the Supreme Court of the Territory
of Hawaii.

[Endorsed]: No. 993. Supreme Court, Territory of Hawaii. October Term, 1916. Caroline J. Robinson, Plaintiff in Error, vs. Lorrin A. Thurston and John D. Paris, Executors under the Will of Eliza Roy, Deceased, Defendants in Error. Writ of Error to the Supreme Court of the Territory of Hawaii. Filed August 8, 1917, at 12:05 P. M. J. A. Thompson, Clerk. [149]

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1916.

CAROLINE J. ROBINSON,

Plaintiff in Error,

vs.

LORRIN A. THURSTON and JOHN D. PARIS,
Executors Under the Will of ELIZA ROY,
Deceased,

Defendants in Error.

**Citation on Writ of Error Returnable to U. S.
Circuit Court of Appeals.**

The United States of America,—ss.

To Lorrin A. Thurston and John D. Paris, Executors
Under the Will of Eliza Roy, Deceased,
GREETING:

You and each of you are hereby cited and admonished to be and appear in the United States Circuit

Court of Appeals for the Ninth Circuit, at San Francisco, State of California, within thirty (30) days after the date of this citation, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the Territory of Hawaii, wherein Caroline J. Robinson is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 8th day of August, in the year of our Lord, one thousand nine hundred and seventeen.

[Seal]

A. G. M. ROBERTSON,

Chief Justice, Supreme Court of the Territory of Hawaii.

[Seal]

Attest: J. A. THOMPSON,

Clerk, Supreme Court of the Territory of Hawaii.

[150]

Due service of the within citation and receipt of copy thereof is hereby admitted this 8th day of August, 1917.

ANDREWS & PITTMAN,

Attorneys for Defendants in Error, Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased.

[Endorsed]: No. 993. Supreme Court of the Territory of Hawaii. October Term, 1916. Caroline J. Robinson, Plaintiff in Error, vs. Lorrin A. Thurston

and John D. Paris, Executors Under the Will of Eliza Roy, Deceased, Defendants in Error. Citation of Writ of Error Returnable to Circuit Court of Appeals.

Filed August 8, 1917, at 12:05 P. M. and issued same for service. J. A. Thompson, Clerk.

Returned August 8, 1917, at 3:25 P. M. J. A. Thompson, Clerk. [151]

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1916.

CAROLINE J. ROBINSON,

Plaintiff in Error,

vs.

LORRIN A. THURSTON and JOHN D. PARIS,
Executors Under the Will of ELIZA ROY,
Deceased,

Defendants in Error.

**Praeipice for Transcript of Record on Writ of Error
Returnable to U. S. Circuit Court of Appeals.**

To JAMES A. THOMPSON, Esq., Clerk of the Supreme Court of the Territory of Hawaii:

You will please prepare a transcript of a record in the above-entitled cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit under the Writ of Error heretofore issued by said Court, and include in said transcript the following pleadings, proceedings, opinions, judgments and papers on file in said cause, to wit:

1. Petition for Writ of Error to Circuit Court of the First Circuit;
2. Notice of Issuance of Writ of Error, and Assignment of Errors;
3. Bond on Writ of Error.
4. Summons of the Supreme Court of Hawaii, with Return of Service Attached Thereto;
5. Writ of Error;
6. Bill of Complaint;
7. Term Summons of Circuit Court of the First Circuit, with Return Service Attached Thereto; [152]
8. Answer of Defendants;
9. Amended Answer of Defendants;
10. Opinion and Decision of Hon. C. W. Ashford, First Judge, Circuit Court, First Circuit;
11. Plaintiff's Exceptions to Decision;
12. Judgment of the Circuit Court, First Circuit;
13. Plaintiff's Exception to Judgment.
14. Clerk's Minutes of the Circuit Court, First Circuit;
15. Transcript of Testimony;
16. Plaintiff's Exhibit "A";
17. Plaintiff's Exhibit "B";
18. Opinion of the Supreme Court of Hawaii;
19. Judgment of the Supreme Court of Hawaii;
20. Minutes of Clerk of Supreme Court;
21. Rule 4 of Circuit Court, First Circuit;
22. Petition for Writ of Error and Supersedeas Returnable to U. S. Circuit Court of Appeals, Affidavit Thereto Attached, and Order Allowing Said Writ;

23. Assignment of Errors;
24. Supersedeas and Cost Bond on Writ of Error;
25. Writ of Error to Supreme Court of the Territory of Hawaii;
26. Citation and Acknowledgment of Service Thereof;

You will also annex to and transmit with the record [153] the original writ of error from the United States Circuit Court of Appeals for the Ninth Circuit, and citation with return of service, your return of the writ of error under the seal of the Supreme Court of the Territory of Hawaii and also your certificate under seal stating in detail the cost of the record and by whom the same was paid.

Honolulu, August 10th, 1917.

Respectfully,

HOLMES & OLSON,

Attorneys for Plaintiff in Error.

Service of a copy of the foregoing Praeceptum for Transcript is hereby acknowledged.

ANDREWS & PITTMAN,

W. B. P.,

Attorneys for Defendants in Error.

[Endorsed]: No. 993. In the Supreme Court, Territory of Hawaii. October Term, 1916. Caroline J. Robinson, Plaintiff in Error, vs. Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased, Defendants in Error. Praeceptum for Transcript of Record on Writ of Error Returnable to U. S. Circuit Court of Appeals. Holmes & Olson, 863 Kaahumanu Street, Honolulu, Attorneys for Plaintiffs in Error.

Filed August 10, 1917, at 9:45 A. M. J. A. Thompson, Clerk. [154]

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1916.

CAROLINE J. ROBINSON,

Plaintiff in Error,

vs.

LORRIN A. THURSTON and JOHN D. PARIS,

Executors Under the Will of ELIZA ROY,

Deceased,

Defendants in Error.

**Writ of Error to the Supreme Court of the Territory
of Hawaii.**

The United States of America,—ss.

The President of the United States to the Honorable
Justices of the Supreme Court of the Territory
of Hawaii, GREETING: .

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the Territory of Hawaii, before you, or some of you, between Caroline J. Robinson, plaintiff in error, and Lorrin A. Thurston and John D. Paris, executors under the will of Eliza Roy, deceased, defendants in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by their complaint appears:

We being willing that error, if any there hath been, shall be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do com-

mand you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth [155] Circuit, together with this writ, so that you have the same in the said United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, State of California, within thirty (30) days from the date hereof, that, the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Ninth Circuit may cause further to be done therein to correct that error, what of right, according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 8th day of August, in the year of our Lord one thousand nine hundred and seventeen.

[Seal] J. A. THOMPSON,
Clerk of the Supreme Court of the Territory of
Hawaii.

The foregoing is hereby allowed this 8th day of August, 1917.

[Seal] A. G. M. ROBERTSON,
Chief Justice of the Supreme Court of the Territory
of Hawaii. [156]

[Endorsed]: No. 993. Supreme Court, Territory of Hawaii. October Term, 1916. Caroline J. Robinson, Plaintiff in Error, vs. Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased, Defendants in Error. Writ of Error

to the Supreme Court of the Territory of Hawaii.
Filed August 8, 1917, at 12:05 P. M. J. A. Thompson,
Clerk. [157]

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1916.

CAROLINE J. ROBINSON,

Plaintiff in Error,

vs.

LORRIN A. THURSTON and JOHN D. PARIS,
Executors Under the Will of ELIZA ROY,
Deceased,

Defendants in Error.

**Citation on Writ of Error Returnable to U. S.
Circuit Court of Appeals.**

The United States of America,—ss.

To Lorrin A. Thurston and John D. Paris, Executors
Under the Will of Eliza Roy, Deceased:
GREETING:

You and each of you are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, State of California, within thirty (30) days after the date of this citation, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the Territory of Hawaii, wherein Caroline J. Robinson is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should

not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 8th day of August, in the year of our Lord one thousand nine hundred and seventeen.

A. G. M. ROBERTSON,
Chief Justice of the Supreme Court of the Territory
of Hawaii.

[Seal] Attest: J. A. THOMPSON,
Clerk, Supreme Court of the Territory of Hawaii.

[158]

Due service of the within citation and receipt of copy thereof is hereby admitted this 8th day of August, 1917.

ANDREWS & PITTMAN,
Attorneys for Defendants in Error, Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased. [159]

[Endorsed]: No. 993. Supreme Court of the Territory of Hawaii. October Term, 1916. Caroline J. Robinson, Plaintiff in Error, vs. Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased, Defendants in Error. Citation of Writ of Error Returnable to Circuit Court of Appeals. Filed August 8, 1917, at 12:05 P. M., and Issued Same for Service. J. A. Thompson, Clerk. Returned August 8, 1917, at 3:25 P. M. J. A. Thompson, Clerk. [160]

In the Supreme Court of the Territory of Hawaii.

CAROLINE J. ROBINSON,

Plaintiff in Error,

vs.

LORRIN A. THURSTON and JOHN D. PARIS,

Executors Under the Will of ELIZA ROY,

Deceased,

Defendants in Error.

Certificate of Clerk to Transcript of Record.

Territory of Hawaii,

City and County of Honolulu,—ss.

I, James A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, by virtue of the foregoing Writ of Error and in obedience thereto, the original of which said Writ of Error is herewith returned, being pages 155 to 157, both inclusive, of the foregoing transcript of record, and in pursuance of the Praecipe to me directed, a copy whereof is hereto attached, being pages 152 and 154, both inclusive, DO HEREBY TRANSMIT to the Honorable United States Circuit Court of Appeals for the Ninth Circuit the foregoing transcript of record, being pages 1 to 131, both inclusive, and pages 133 to 151, both inclusive, and I DO CERTIFY the same to be full, true and correct copies of the pleadings, exhibits, testimony, clerk's minutes, record, proceedings, opinions and final judgment which are on file and of record in the office of the Clerk of the Supreme Court of the Territory of Hawaii in the case entitled

in the said Court, "Caroline J. Robinson, Plaintiff in Error, vs. Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased, Defendants in Error," and in said Supreme Court numbered and docketed as Number 993. [161]

I FURTHER CERTIFY that page 132 of the foregoing transcript of record is a full, true and correct copy of Rule 4, of the Rules of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, which were approved by the Supreme Court of said Territory on the 12th day of January, 1914, and that said Rule 4 was in force and effect on the 30th day of March, 1914, and has been in force and effect ever since said last-mentioned date.

I DO FURTHER CERTIFY that the original citation on writ of error with acknowledgment of service thereof, being pages 158 to 160, both inclusive, of the foregoing transcript of record, are hereto attached and are herewith returned.

I LASTLY CERTIFY that the cost of the foregoing transcript of record is Thirty-seven and 70/100 (\$37.70) Dollars, and that said amount has been paid by Caroline J. Robinson, the plaintiff in error herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the Supreme Court of the Territory of Hawaii, at Honolulu, City and County of Honolulu, this 15th day of August, A. D. 1917.

[Seal]

JAMES A. THOMPSON,

Clerk of the Supreme Court of the Territory of Hawaii. [162]

[Endorsed]: No. 3038. United States Circuit Court of Appeals for the Ninth Circuit. Caroline J. Robinson, Plaintiff in Error, vs. Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased, Defendants in Error. Transcript of Record. Upon Writ of Error to the Supreme Court of the Territory of Hawaii.

Filed August 25, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

IN THE UNITED STATES CIRCUIT COURT
OF APPEALS

FOR THE
NINTH CIRCUIT

CAROLINE J. ROBINSON,
Plaintiff-in-Error,

vs.

LORRIN A. THURSTON and JOHN D. PARIS,
Executors under the Will of ELIZA ROY; de-
ceased,
Defendants-in-Error.

BRIEF FOR PLAINTIFF IN ERROR

HENRY HOLMES,
CLARENCE H. OLSON,
Attorneys for Plaintiff-in-Error.

Filed
001 3-11
F. D. Monckton,
Clerk.

No. 3038

IN THE UNITED STATES CIRCUIT COURT
OF APPEALS

FOR THE
NINTH CIRCUIT

CAROLINE J. ROBINSON,
Plaintiff-in-Error,

vs.

LORRIN A. THURSTON and JOHN
D. PARIS, Executors under the
Will of ELIZA ROY, deceased,
Defendants-in-Error.

*Error to
the Supreme
Court of the
Territory of
Hawaii.*

BRIEF FOR PLAINTIFF IN ERROR

For the sake of brevity, we will refer to the plaintiff-in-error as plaintiff, and to the defendants-in-error as defendants.

I. STATEMENT OF THE CASE.

1. *Facts.*

Defendants are executors of the Will of Eliza Roy, deceased, who died on or about August 29, 1912. The plaintiff is a daughter of Eliza Roy.

Prior to November 27th, 1905, said Eliza Roy had executed and delivered to three different parties

(none of them the plaintiff) three promissory notes (two of which were secured by mortgages on land in Kona, on the Island of Hawaii), and these, for a valuable consideration, came into plaintiff's possession before said date. (Transcript, p. 2.)

On November 27th, 1905, an agreement under seal was entered into between Caroline J. Robinson, plaintiff herein, and her mother, Eliza Roy (Plaintiff's Exhibit "B," p. 117 of Record), which agreement recited the substance of the three notes heretofore mentioned, after which Caroline J. Robinson did, for the consideration of Ten Dollars (\$10), thereby "acknowledge full payment and settlement of said indebtedness, principal and interest," and did thereby "release the same and cancel and discharge the said notes and mortgages." In the same sentence with these words, however, there is the following proviso: "Provided, however, that if the said Eliza Roy shall at any time hereafter mortgage or sell any of her real estate or shall incur indebtedness amounting at any one time to the sum of One Thousand Dollars (\$1,000) and upwards without the consent in writing of the said Caroline J. Robinson, then and in such case this acknowledgment of payment of said indebtedness and said release and cancellation and discharge of said notes and mortgages shall be null and void and of no effect and said enumerated indebtedness and interest thereon shall immediately become due and payable by the said Eliza Roy, her heirs, executors, administrators and assigns to the said Caroline J. Robinson, her heirs,

executors, administrators and assigns with interest thereon at the several rates aforesaid, in the same manner as though this acknowledgment of payment and release of said notes and mortgages had not been made."

After the death of Eliza Roy the plaintiff duly presented to the defendants, as executors aforesaid, her claim under and in respect of said promissory notes, demanding payment thereof. This claim having been rejected by defendants, plaintiff commenced her action in the Circuit Court for recovery of said claim, alleging in her complaint, in substance, that said notes had become due and payable to plaintiff by reason of the fact that after the execution of the agreement of November 27th, 1905, and prior to her death, "said Eliza Roy did without the consent of plaintiff, incur indebtedness amounting in the aggregate at one time to more than One Thousand Dollars." (Record, p. 19 .)

At the conclusion of the case the Court rendered a decision in which it found as a fact that Eliza Roy "did incur such indebtedness, after the execution of said agreement to an aggregate of more than One Thousand Dollars (\$1,000) at a time" (and without plaintiff's consent) (Record, p. 19), but that as a matter of law such fact "did not deprive her of the benefit of the release and discharge of said indebtedness expressed in said agreement." In reaching this conclusion the trial court relied on and adopted the law as expressed in the case of *Tyson vs. Dorr*, 6 Whart. (Pa.) 255, and gave judgment in favor of

the defendants, after which plaintiff petitioned the Supreme Court of the Territory of Hawaii for a writ of error.

On June 15th, 1917, said Supreme Court (Robertson, C. J., dissenting) affirmed the judgment entered by the trial court, and plaintiff comes here by writ of error.

2. *Conflicting Views as to the Law of the Case.*

The trial court held that the condition attached to the release was void, for as was stated in the case of *Tyson vs. Dorr*, 6 Whart. (Pa.) 255, "a man cannot release a personal action as an obligation, with a condition subsequent, but the condition will be void, for a personal action once suspended, is extinguished forever."

On appeal, the three justices of the Supreme Court of the Territory of Hawaii concurred in stating that the trial judge erred in his view of the law of the case, viz:

"The ancient case of *Tyson vs. Dorr* supra, cited in support of this doctrine, has long since been discarded and the modern rule is that a release of an existing debt with conditions subsequent merely suspends the right of action thereon until such time, if ever, the event contemplated occurs." (Record, p. 129.)

But on an entirely different ground, Mr. Justice Coke, with whom Mr. Justice Quarles concurred, held that plaintiff could not prevail. "We are of opinion," he states, "that the clause in the agreement referred to, which attempted to restrain Eliza

Roy from incurring indebtedness to the amount at any one time of One Thousand Dollars or over, without the consent of plaintiff herein, constituted an abnegation of her legal rights, without benefit to plaintiff, was an unreasonable restraint of trade and is therefore void on the ground of public policy. It follows that, the condition being void, an action based upon a breach thereof could not be maintained." (Record, p. 134.)

Still another view was taken by Chief Justice Robertson, who, in a dissenting opinion, stated: "I must dissent from the * * ruling that the judgment should be affirmed on the ground that the condition subsequent was against public policy and void, and that the release, therefore, was an absolute one * * * public policy is more concerned with the enforcement of private contracts than it is with defeating them * * * Wherein an agreement made with her daughter by an elderly lady living upon her own means and upon her own premises in a country district, who does not appear to have been engaged in any business, trade or profession, upon a valuable consideration, that she will not incur indebtedness in excess of \$1,000, is unreasonable, oppressive, immoral or detrimental to public interest or welfare, I humbly confess my inability to see."

The above abstract clearly shows the diversity of the several opinions rendered by men learned in the law upon the legal questions involved in this case. Wherefore, plaintiff prosecutes this appeal.

3. *General Remarks.*

An examination of the agreement (plaintiff's Exhibit "B") discloses a release of three personal obligations (two of which were secured by mortgages on land) upon condition subsequent, viz: "provided, however, *that if the said Eliza Roy shall at any time hereafter * * * incur indebtedness* amounting at any one time to the sum of One Thousand Dollars (\$1,000) and upwards without the consent in writing of the said Caroline J. Robinson, *then and in such case*" this release to be null and void and "said enumerated indebtedness and interest thereon shall immediately become due and payable" * * *

All three justices of the Supreme Court of the Territory of Hawaii having concurred in stating that "the modern rule is that a release of an existing debt with conditions subsequent merely suspends the right of action thereon until such time, if ever, the event contemplated occurs" (Record, p. 129, and authorities there cited), we do not consider it necessary to argue in support of this ruling.

Why, then, may not plaintiff succeed in her present action?

The answer given by Justices Coke and Quarles (Chief Justice Robertson dissenting) is:

The condition attached to the release "which attempted to restrain Eliza Roy from incurring indebtedness to the amount at any one time of One Thousand Dollars or over, without the consent of plaintiff * * * was an unreasonable restraint of trade and is therefore void on the ground of public pol-

icy.” (Record, p. *134*.) And it is the judgment signed in pursuance of this decision which has occasioned the present appeal.

II. SPECIFICATION OF ERRORS RELIED ON.

1. *Error No. 5 in Assignment of Errors.*

“That the said Supreme Court erred in holding and deciding that the said condition and proviso in said agreement was against public policy.”

2. *Error No. 12 in Assignment of Errors.*

“That the said Supreme Court erred in not holding and deciding that the defendants-in-error were barred from the defense of illegality of said agreement, by reason of their failure to raise the said defense by demurrer, answer or any other pleading or otherwise, or to give notice of the same in any way, in said Circuit Court, or to urge or raise the same in any way in said Supreme Court.”

3. *Error No. 13 in Assignment of Errors.*

“That the said Supreme Court erred in holding and deciding that the defendants-in-error were not barred from the defense of illegality of said agreement by reason of their failure to give notice of their intention to rely upon the same, as required by Rule 4 of the Rules of said Circuit Court, which Rule 4 reads as follows:

“‘In personal actions, the statute of limitations shall be specially pleaded and no defendant shall be allowed to set up by way of defense to the plaintiff’s claim any illegality, fraud, release, payment, infancy, coverture, or discharge under any statute relating to bankruptcy or insolvency, unless he shall, on filing his answer, give notice within his answer or at the foot thereof, of his intention to rely upon the same.’”

III. POINTS UNDER SPECIFICATION OF ERRORS.

1. The Supreme Court erred in deciding that the clause in the agreement which “attempted to restrain Eliza Roy from incurring indebtedness to the amount at any one time of One Thousand Dollars or over without the consent of plaintiff, constituted an abnegation of her legal rights, was without benefit to plaintiff, was an unreasonable restraint of trade and is therefore void on the ground of public policy.” (Record, p. 134.)

2. The Supreme Court erred in not holding and deciding that the failure of defendants to give notice of their intention to rely upon the defense of illegality as required by Rule 4 of the Circuit Court rules, barred defendants and the court from considering such defense in this cause.

IV. ARGUMENT.

1. The Supreme Court erred in deciding that the clause in the agreement which “attempted to restrain Eliza Roy from incurring indebtedness to the amount at any one time of One Thousand Dollars or over without the consent of plaintiff, constituted an abnegation of her legal rights, was without benefit to plaintiff, was an unreasonable restraint of trade and is therefore void on the ground of public policy.” (Record, p. 134), for

(a) There was no restraint;

(b) The rules of law governing contracts in restraint of trade have no application in this case, for

(1) Such rules govern contracts which seek to restrain the promisor from practicing or carrying on a trade or profession, or business, or seek to create a monopoly, control prices, or prevent competition.

(2) In the case at bar Eliza Roy was not engaged in any trade, business or profession, nor does the contract tend to create a monopoly, control prices or prevent competition.

(c) But even if the rules of law governing contracts in restraint of trade have application in this case, the condition annexed to the release is a valid condition.

(d) Public policy is more concerned with the enforcement of private contracts than it is with defeating them.

(e) Public policy should favor a release of indebtedness.

(a) There was no restraint, as what was to happen in case she did incur such indebtedness was that the release ceased to be effective, and said enumerated indebtedness should immediately become due and payable. The agreement plainly states: "*if the said Eliza Roy shall * * * incur indebtedness * * * then and in such case * * * said release * * * shall be null and void and said indebtedness * * * shall immediately become due * * * in the same manner as though this * * * release of said notes and mortgages had not been made,*"—thus showing that the parties clearly contemplated that Eliza Roy could and probably would get into

debt again, and provided what should be the rights and obligations of the parties if she should do so. In that event the notes and mortgages were to be of full force and effect.

There was nothing in the agreement that did not leave Mrs. Roy at liberty to sell her land or to incur debt in excess of \$1,000 without plaintiff's consent, but this she could not do and claim the benefit of the release, as the majority of the Justices of the court below have decided by holding the condition void. In other words, if it suited Mrs. Roy to avail herself of the release she could do so: if not she had merely to place plaintiff in the same position in which she stood before the agreement was signed. She was not to have the benefit of the release for the purpose of being free to get rid of her property or to get into debt again to a considerable amount when she pleased.

(b) The rules of law governing contracts in restraint of trade have no application in this case, for

(1) Such rules govern contracts which seek to restrain the promisor from practising or carrying on a trade or profession or business, or seek to create a monopoly, control prices, or prevent competition.

(2) In the case at bar Eliza Roy was not engaged in any trade, business or profession, nor does the contract tend to create a monopoly, control prices or prevent competition.

(1) Such rules govern contracts which seek to restrain the promisor from practising or carrying on a

trade or profession or business, or seek to create a monopoly, control prices, or prevent competition.

At common law the rules governing contracts in restraint of trade were only extended to such contracts as tended to restrain a man's right to exercise his trade or calling. (6 R. C. L. 785.) "By the common law contracts treated as being in restraint of trade were *limited* to contracts having for their purpose the purchase of some trade or business, as a part of which the seller agreed not to engage in the trade or business he had disposed of. But in dealing with conditions brought about by modern business methods, it has been found necessary for the public good to extend the common law prohibition against contracts in restraint of trade to cases involving more than the mere purchasing and selling of a trade or business, so as to give the courts, for the good of the public, authority to prevent, as much as possible, combinations and arrangements having for their purpose the creation of a monopoly, the control of prices and the suppression of competition." (6 R. C. L. 787.) See *Brent vs. Gay*, 149 Ky. 615, 41 L. R. A. N. S. 1034, which case involved a contract to secure control of the market on blue grass seed, and thereby control prices, which would, of course, cause a reflex injury to the public.

But this is as far as the law has gone in extending the principles of law governing restraints of trade; viz: to "prevent, as much as possible, combinations and arrangements, having for their purpose the creation of a monopoly, the control of prices, and

the suppression of competition." It is easy to understand why the law would want to control contracts tending to create "a monopoly" and to control prices, and to suppress competition, for the public has a direct vital interest in seeing that its members may buy goods at fair prices, to which end competition must be fostered. And it is not difficult to understand why the law would want to control contracts which in their tendency or necessary effect prohibit a man from carrying on his chosen trade, occupation, calling or profession, as the needs of society call for the encouragement of men to carry on their chosen form of occupation. Any restriction which curtails a man's right to practise such trade or profession beyond the point where it is of advantage to the promisee to restrain him, is only injurious to the public, and is not a real benefit to anyone.

But in order more clearly to point out the underlying difference in principle between the rules of law governing contracts in restraint of trade and the rules of law properly applicable to the facts of the case at bar, we will briefly consider the history of the rules of law governing restraints of trade and the purpose they are supposed to fulfill.

The first reported case concerning restraints of trade is that of John Dier, decided in 1415, Year Book 2, Hen. V, 5, referred to in the leading case of *Mitchell vs. Reynolds*, 1711, 1 P. Wms. 181. In the last mentioned case, Parker, C. J., said (p. 189): "But from hence I would infer: that where there may be a way found out to perform the condition,

without a breach of the law, it shall be good." And here in this opinion of Parker, C. J. (which opinion has been carefully considered in practically every decision affecting restraints of trade since 1711), we find the beginning of what the cases will show is the paramount rule now governing contracts in restraint of trade, viz. (as Chief Justice Robertson in his opinion well expresses it), that "the law is more concerned with the enforcement of private contracts than it is with defeating them." "The law is not so unreasonable as to set aside a man's own agreement for fear of an uncertain injury to him, and fix a certain damage upon another, as it must do if contracts with a consideration were made void." *Mitchell vs. Reynolds*, supra, p. 190. "To conclude, in all restraints of trade, where nothing more appears, the law presumes them bad, but if the circumstances are set forth, that presumption is excluded, and the court is to judge of those circumstances, and determine accordingly, and if upon them it appears to be a just and honest contract, it ought to be maintained." (Id., p. 196.)

As showing the steady development of the law having to do with restraints of trade, see (1) Footnote to 1 Smith's Leading Cases, 1866 Edition, p. 619, notes by Hare and Wallace; (2) note on pp. 751-765, 92 American Decisions; (3) the case of *Hall Manufacturing Co. vs. Western Steel and Iron Works* (1915, 227 Fed. 588, L. R. A. 1916 C, 620, and note, 626).

The general rule of law governing restraints of

trade at the present time is well stated by Christianity, C. J., in the case of *Hubbard vs. Miller*, 27 Mich. 15:

“But if, considered with reference to the *situation, business and objects* of the parties, and *in the light of all the surrounding circumstances with reference to which the contract was made*, the restraint contracted for appears to have been for a just and honest purpose for the protection of the legitimate interest of the party in whose favor it is imposed, reasonable as between them, and not specially injurious to the public, the restraint will be held valid.”

See also 6 R. C. L. 789.

In view of the above rule it becomes necessary to consider what rules if any have been adopted for determining whether or not a contract is reasonable as between the parties.

“No better test can be applied to the question whether a particular contract is reasonable than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public.” 6 R. C. L. 789.

(See also *Hubbard vs. Miller*, *supra*; *Horner vs.* by the other party.” 6 R. C. L. 790.

A further point to be considered is whether the restraint is itself the main object of the contract, or ancillary to a main lawful purpose. For it is clear that the former would tend to create a monopoly and would be against public policy. *Hubbard vs. Miller*, *supra*, p. 19.

So the rule is stated:

“From the tests laid down for determining the validity of such an agreement, it seems to follow that no conventional restraint of trade can be enforced, unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party.” 6 R. C. L. 790.

But with respect to all the cases upon this subject which we have been able to read,—from the ancient case of *Mitchell vs. Reynolds*, 1 P. Wms. 181, to the modern case of *Hall Manufacturing Co. vs. Western Steel and Iron Works*, 1915, 1916C L. R. A. 620,—we must observe that they have reference to contracts between men or firms or corporations, wherein one party sells the goodwill of his trade, business or profession to another, and a part of the consideration of the sale is a promise on the part of the vendor that he will not carry on said trade, business or profession within certain or uncertain areas, for a certain or uncertain period of time.

And the purpose which the law has in stating that such contracts shall be no broader in their terms than are reasonably necessary for the protection of the parties themselves, is that the public has a direct vital interest in promoting trade and commerce and will not let a private contract interfere with the public good.

Summarizing, then, the rules of law which we have

found govern contracts in restraint of trade, we have the following :

“By the common law contracts treated as being in restraint of trade were *limited* to contracts having for their purpose the purchase of some *trade or business*, as a part of which the seller agreed not to engage in the trade or business he had disposed of.” (6 R. C. L. 785.)

In dealing with modern business conditions “it has been necessary for the public good *to extend* the common law prohibition against contracts in restraint of trade to cases involving more than the mere purchasing and selling of a trade or business, so as to give the courts, for the good of the public, authority to prevent, as much as possible, *combinations and arrangements having for their purpose the creation of a monopoly, the control of prices and the suppression of competition.*” (6 R. C. L. 787.)

And in dealing with *such contracts*, the courts have laid down the following general rules :

“But if, considered with reference to the situation, business and objects of the parties, and in the light of all the surrounding circumstances with reference to which the contract was made, the restraint contracted for appears to have been for a just and honest purpose for the protection of the legitimate interests of the party in whose favor it is imposed, reasonable as between them, and not specially injurious to the public, the restraint will be held valid.” Christiancy, C. J., in *Hubbard vs. Miller*, 27 Mich. 15.

To determine whether the restraint is reasonable as between the parties the rule is: "No better test can be applied to the question whether a particular contract is reasonable than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public." 6 R. C. L. 789.

The restraint must be ancillary to the main purpose of an otherwise lawful contract. 6 R. C. L. 790.

The question then arises: What relation is there between the rules governing restraints of trade aforesaid, which were made in order that no man might be unreasonably restrained from pursuing his business, trade or profession, which the public was interested in seeing him do,—and the contract in the case at bar?

(2) In the case at bar Eliza Roy was not engaged in any trade, business or profession, nor does the contract tend to create a monopoly, control prices or prevent competition.

The answer to the question asked above is best stated in the words of Chief Justice Robertson (Record, p. 139): Eliza Roy was an "elderly lady living upon her own means and upon her own premises in a country district who does not appear to have been engaged in any business, trade or profession." She made a simple contract with her daughter, who had purchased from her creditors three of her outstanding notes, two of which were secured by mortgages. This contract contained a release of said in-

debtedness, upon condition that if Mrs. Roy incurred indebtedness in excess of \$1,000 at any one time and without plaintiff's consent, the release was to be void. It is a simple contract between two women,—mother and daughter,—having no relation to business, the object of which was to relieve a mother of her mortgage debts. How such a contract,—reasonable as between the parties as of the date when it was made,—can be injurious to the public in any way, it is hard to understand.

(c) But even if the rules of law governing contracts in restraint of trade have application in this case, the condition annexed to the release is a valid condition, for

“If, considered with reference to the situation, business and objects of the parties, and in the light of all the surrounding circumstances with reference to which the contract was made, the restraint (we cannot concede that there was any restraint in this case in view of the facts) contracted for appears to have been for a just and honest purpose, for the protection of the legitimate interests of the party in whose favor it is imposed, reasonable as between them and not specially injurious to the public, the restraint will be held valid.”

Hubbard vs. Miller, supra; 6 R. C. L. 789.

The contract in the case at bar “considered with reference to the situation, business and objects of the parties, and in the light of all the circumstances with reference to which the contract was made,” has been ably dealt with by Chief Justice Robertson in

the concluding paragraph of his dissenting opinion. (Record, p. 139 .)

The "restraint" which (according to the view of the majority of the Supreme Court) this contract imposed upon Eliza Roy, must be deemed to have been for "a just and honest purpose," for the only purposes which the parties sought to accomplish by executing the contract were (1) to release Eliza Roy from her debts, and (2) to encourage her to live within her means thereafter.

The condition was a benefit to plaintiff, for was it not a benefit to plaintiff that her mother,—this "elderly lady (who made her mark to the agreement) living upon her own means and upon her own premises in a country district who does not appear to have been engaged in any trade or profession,"—(as Chief Justice Robertson expresses it),—should agree not to sell her land or to incur indebtedness in excess of \$1,000 at any one time without consent of plaintiff, who had first acquired and then released her mortgage debts conditionally upon her doing so? So long as the agreement was observed she might expect not to be called upon again to relieve her mother's estate from debts or provide for her in case she dissipated her property. The return plaintiff got from her mother for relieving her of her debts was the agreement not to dispose of her property or to incur further debts of large amount,—and is it for others to say that this agreement, if carried out, was of no benefit to her daughter?

That the contract was reasonable as between the parties seems equally clear. Certainly it is more

than reasonable in so far as Eliza Roy is concerned, for she secured a release of indebtedness amounting to \$14,490.83 and a release of her mortgages upon condition, and gave in return \$10 and a promise that she would not incur further indebtedness in excess of \$1,000 at a time without plaintiff's consent.

"Not specially injurious to the public," is a further test to be applied. It is not difficult to understand how a contract which precludes an artisan, or mechanic, or baker, or doctor, or lawyer from plying his trade or following his profession within a certain or uncertain area, is injurious to the public, for the public may need the services of that man in his particular calling. And yet even a contract which restrains one of such men from following his trade or profession, is a valid contract, if it conforms to the rules above mentioned. But it is difficult to understand how this simple contract between two women could possibly have any injurious influence upon, or cause any damage to, the public.

(d) "Public policy is more concerned with the enforcement of private contracts than it is with defeating them." (Robertson, C. J., Record, p. 138.)

In the ancient case of *Mitchell vs. Reynolds*, supra, we find the learned justice balancing the freedom of contract against the technical rules governing restraints of trade, after which he makes the statement:

"That where there may be a way found out to perform the condition, without a breach of the law, it shall be good." (1 p. Wms. 189.) Here, then, is evidence of the early tendency of courts to give ef-

fect where possible to a contract fairly made between competent parties, and the forerunner of what is now a well-defined presumption in American jurisprudence, viz: "The fundamental rule is that a contract will be construed, if possible, as being made for a legal rather than for an illegal purpose." (*Delaware L. and W. R. Co. vs. Kutter*, 1906, 147 Fed. 51, 62, citing *Hobbs vs. McLean*, 117 U. S. 569.)

And in *Hubbard v. Miller*, supra, Christiancy, C. J., (p. 23) said: "as parties are not lightly to be presumed to intend a violation of the law, it would still be our duty, according to the well-settled rules of law, to adopt the construction which would make it conform to the law, rather than that which would violate the law." (Citing authorities.)

We note also the case of the *Hall Manufacturing Company v. Western Steel and Iron Works*, a case decided in the United States Circuit Court of Appeals for the Seventh Circuit. (1915, 227 Fed. 588; 1916C L. R. A. 620.)

In that case appellee, in consideration of being able to sell to appellant its entire stock of diggers and augers covenanted "not again to go into the manufacture of posthole augers and diggers." (It will be noted that this covenant is without limit as to time or space.) Appellee violated the covenant and the suit resulted. Appellee then contended that the contract was against public policy;

But the court said: "*It stands*, unless it must be overthrown on account of covenantor's objections." (It will be noted that the attitude of the court is to

hold the contract good "unless it must be overthrown," etc. The presumption in favor of the validity of this covenant, which, as above noted, appears to be without limit of time or space, is clearly shown.)

"In this case," the court goes on to say, "and in all of the kind, two public interests are to be balanced against the one that is opposed to restrictive covenant. Honesty and fidelity among our business men; and the interest of everyone, and so of all, in being able to sell on the most advantageous terms whatever property he owns or has produced, whether tangible or intangible. *Unless injury to the public manifestly outweighs the public policies of honesty and of freedom of alienation, restrictive covenants should be enforced,*" and the court decided that the contract was not against public policy.

In addition to the above noted tendency of the courts to adopt where possible that construction of a contract which will result in its enforcement, there is a fundamental right of private contract, and a right to have that contract enforced, which must be carefully considered.

In the case of *Printing Co. v. Sampson* (1875, 19 L. R. Eq. 462-465), Sir George Jessel, M. R., p. 465, said:

"It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another *public policy requires*, it is that men of full age and

competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. *Therefore you have this paramount public policy to consider, that you are not lightly to interfere with this freedom of contract."*

And the Supreme Court of the United States in the case of the *B. & O. R. Co. vs. Voigt*, 176 U. S. 498, 505, 44 Law. Ed. 565, said: "At the same time it must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that *the usual and most important function of courts of justice is rather to maintain and enforce contracts*, than to enable parties thereto to escape from their obligation on the pretext of public policy, *unless it clearly appear that they contravene public right or the public welfare.*" (And the court quotes with approval the opinion of Sir Gèorge Jessel in *Printing Co. v. Sampson*, *supra*. See also Pingrey's Extraordinary Contracts, p. 286, and cases cited; *Re Garcelon's Estate*, 32 L. R. A. 604.)

And the fact that a contract fairly made between competent parties tends in some small way to interfere with the obligor's private rights, will not affect its validity, so long as such contract is reasonable as between the parties thereto and is not specially injurious to the public, for

"Neither is it a reason against them (restraints) that they are contrary to the liberty of the subject, for a man may, by his own consent, for a valuable

consideration, part with his liberty, as in the case of a covenant not to erect a mill upon his own land.”

Mitchell vs. Reynolds, supra.

“And one may agree not to do what he has a legal right to do, even though the promise may be restrictive of his personal rights.”

9 Cyc. 542, citing *Waite v. Merrill*, 4 Me. 90.

In the last mentioned case (*Waite v. Merrill*) plaintiff had signed the covenant of the Society of Shakers.

One of the clauses in the covenant was that each member, when joining, should place all his private property in the hands of the trustees of the Society, who should administer it for the use of all the Society.

Another clause was, “Never to bring demand or debt against the church or each other, for any interest or services which we have bestowed to the joint interest of the church; but freely to give our time and talents, as brethren and sisters, for the mutual good one of the other, and other charitable uses, according to the order of the church.”

Plaintiff, after remaining in the Society and working for the Society for twelve years, now leaves it, and sues for the value of his services for said period, alleging that the covenant was void as against public policy.

Mellen, C. J., at p. 104: “It is said that it (the covenant) is void, because it deprived the plaintiff of the constitutional power of acquiring and protecting property. The answer to this objection is, that the

covenant only changed the mode in which he chose to exercise and enjoy this right or power; he preferred that the avails of his industry should be placed in the common fund or bank of the Society, and to derive his maintenance from the daily dividends which he was sure to receive." The court further said that the covenant contemplated members joining and leaving the Society, and there was therefore no restriction of personal liberty.

Applying the reasoning of the last mentioned case to the case at bar, we find Eliza Roy using part of her freedom of contract to secure the discharge of a heavy indebtedness, and a release of her property from mortgages; she "changed the mode in which she chose to exercise this right or power" by agreeing to give up her right to incur indebtedness in excess of \$1,000 at a time, in return for a discharge of said obligations, upon condition. And yet the same agreement contemplated her right to incur indebtedness over said sum if she needed or wanted to, "and there was therefore no restriction of personal liberty."

"It seems that a contract is not illegal or void, simply because private rights are interfered with by the act stipulated for; e. g., where the consideration is a breach of contract or of a private trust, the contract may be enforced, and the persons injured by its performance are left to the ordinary means of redress."

Smith's Leading Cases, Vol. 1, pt. 1, p. 623,
Notes by Hare and Wallace, citing *Walker*

v. Richardson, 10 M. & W. 284, per Parke, B.; *Jackson v. Cobbin*, 8 M. & W. 797, per Vaughan, C. J.; *Rudyard's Case*, 2 Vent. 23.

"Where no express prohibition has been laid by statute, the law will permit men to contract in matters concerning their own interest as they think proper, and should be slow to impose restraints drawn from doubtful and remote considerations of public policy. When, however, a contract is of such a nature that it cannot be carried into execution, without reaching beyond the parties and exercising an injurious influence on the community at large, everyone has an interest in its suppression, and it will be pronounced void from due regard to the public welfare." Smith's Leading Cases, *supra*, p. 630; citing *Fuller v. Dame*, 18 Pick. 472; *Frost v. Inhabitants of Belmont*, 7 Allen 152, 162; *Gulick v. Ward*, 5 Halstead 87.

The rule as here stated, then, is: A private contract should be construed as valid and subsisting unless it must necessarily extend beyond the parties and injuriously affect the public. And how is the public affected by a contract between an elderly lady and her daughter, that said elderly lady in order to secure a release of certain obligations will not contract indebtedness in excess of \$1,000 at a time without the daughter's consent; but may do so if she needs to, in which case she is not to have the benefit of the release?

The case of *Brooks v. Cooper*, 1893, 50 N. J. Eq. 761, involved the construction of a contract which the court concluded was made for the purpose of defeating a state statute.

Lippincott, J., at p. 767 said: “* * * there must be kept in view the *general rule of law* that where there is no statutory prohibition, the law will not readily pronounce an agreement invalid on the ground of public policy or convenience, but is, on the contrary, inclined to leave men free to regulate their affairs as they think proper.” But the contract in this case was declared void because its purpose was to violate a state statute.

In *Collister v. Hayman*, 1905 (183 N. Y. 250, 256), plaintiff, who was a licensed ticket speculator, had bought from defendants a large quantity of theatre tickets on which was printed, “If sold on the sidewalk this ticket will be refused at the door.” Plaintiff was engaged in selling said tickets “more than five feet from any point of entrance to the Knickerbocker Theatre.” Defendants employed detectives who warned people about to buy tickets from plaintiff that said tickets would be refused at the door. Plaintiff therefore brought this suit for damages.

The court (p. 256) said: “This is not a case involving the liberty of the plaintiff to sell his property, for he could sell it to any person and in any place, except in the one prohibited by the contract. * * * The contract did not interfere with his absolute freedom of action *except to this limited extent* duly agreed upon in advance, while he attempts to interfere with freedom of contract on the part of defendants by restraining them from enforcing an agreement which they had made and to which he had assented.” (It will be noted there is here an *attempt*

to restrain plaintiff from selling tickets "on the sidewalk" by saying said tickets would be refused at the door. And yet the contract is upheld, for it is said plaintiff had a right to sell them at any other place. Further, it does not appear on the face of the ticket, or in the decision of the court, what the benefit is to defendants that tickets be not sold on the sidewalk, —which benefit Mr. Justice Coke seemed to think in the case at bar, must necessarily appear. The New York court did not raise this point, and left the parties to the plain intent and meaning of their contract. Furthermore, in the case at bar the court, while asserting that the contract interferes with Eliza Roy's right of contract, itself interferes with her right of contract by setting aside a contract which she has made.)

In *Daley v. People B. & L. & S. Association* (1901), 178 Mass. 13, 19, plaintiff was a member and stockholder of the defendant corporation. His contract was subject to terms printed on the back, one of which was:

"Any action brought against this Association by any shareholder shall be brought * * * in the County of Ontario, State of New York."

Plaintiff sued in Massachusetts, and the court, in refusing to give plaintiff the relief asked for, said (p. 19) :

"It is true * * * that our decision requires a resident of Massachusetts to go elsewhere for a remedy upon a contract made here. But objections of this sort may be made to appear more serious than

they are. Courts are less and less disposed to interfere with parties making such contracts as they choose, so long as they interfere with no one's welfare but their own."

In the case of *Sheneberger vs. Union Central Life Insurance Co.* (Iowa, 1901), 55 L. R. A. 269, plaintiff's decedent had executed to the defendant a note in the sum of \$5,000, payable ten years from date, and secured it by a mortgage on his farm. Three years later he obtained a loan on the land from another, and tendered to defendant a sufficient amount to satisfy its mortgage. This was refused, and plaintiff sought to cancel said mortgage. A provision in the note was:

"This note is executed upon the condition that partial payments in any amount at any time after one year will be received. * * * This condition is waived, provided the matured indebtedness has not been paid as agreed, the maker's total indebtedness is not being reduced, or provided the money tendered is borrowed in whole or part elsewhere."

Plaintiff contended that the limitation of the privilege to make payment before maturity to money not borrowed in whole or in part elsewhere was contrary to public policy, and in restraint of trade.

Ladd, J., delivering the opinion of the court, said (p. 270):

"The nature of defendant's business would seem to require that it keep the money entrusted to its care invested so as to return a fair income, and, evidently in return for its concession in the way of receiving payment at any time notwithstanding the expense of

making the loan, the decedent stipulated to make such payment only from his property and income in reduction of his debt burden, and possibly to pay a somewhat higher rate of interest. Without the limitation the duration of the loan would depend solely on the ability of the borrower to obtain cheaper money. With it the likelihood of its retention depended upon contingencies, i. e., his wish and his ability to pay from his means. In other words, *the parties chose to contract with reference to their situation, as they had a perfect right to do*. If the debtor could secure a lower rate of interest by agreeing not to exercise the option of paying before maturity save from money not borrowed, we know of no reason for depriving him of the opportunity. The note would have been valid without the option. *It is valid with an option depending on any condition not immoral or opposed to public policy*. This was neither. Affirmed."

Applying the reasoning of the court in the last mentioned case, we may say as to the case at bar:

"If the debtor" (Eliza Roy) "could secure" a release of her indebtedness "by agreeing not to exercise" her right to incur indebtedness in excess of \$1,000 at a time without plaintiff's consent, "we know of no reason for depriving her of the opportunity."

(e) Public policy should favor a release of indebtedness.

The law favors any act by a creditor which will tend to extinguish debt. The fact that we have a National Bankruptcy Act supports this contention. Certainly a relative, as in our case, would have no reason or desire to give a release without a reasonable limitation or condition attached, as to release a habitual debtor is merely to allow him or her to get

into debt again, and the good efforts of the releasor have been wasted. The incentive to release, if no reasonable limitation may be attached, is absent, for without such limitation, the releasor may be called upon in a very short time to pay off new debts of the debtor.

May a generous person not say: "My mother is badly in debt. I owe her the filial duty of caring for her if it is in my power. Her lands are mortgaged and her affairs are generally badly entangled. In order to make her secure against her own poor management, and to provide for her old age, I will buy in these evidences of indebtedness and then release them, provided only, that by some means I can restrain her from getting into the same tangle again. I will give her some latitude to incur indebtedness—the amount fixed was \$1,000—and I will agree that she may spend up to that amount without a breach of the contract, and if she spends over it, my notes and mortgages are to come back into full force and effect?"

So a release of the indebtedness is executed, upon condition that if the debtor contracts new debts in excess of the given amount, the old obligation is to revive. Has the debtor been imposed upon by such an arrangement? Is there anything in it unfair as to her? She gives up a right to make foolish expenditures, and is to reap a considerable benefit as long as she lives up to her contract. She can go back to the old arrangement any time she chooses, and

has the full benefit of the new arrangement as long as she cares to use it.

It is submitted that if plaintiff had said to Eliza Roy, "If you will not contract indebtedness amounting to \$1,000 at a time or over without my consent for five years (or a longer term) from this date, I will then release your indebtedness," and Eliza Roy had lived up to the terms of the agreement, she could have enforced the contract at the end of the time,—but only in case she had lived up to her part of it. A contract in which A agreed with B that if B would refrain from the use of liquor for a certain period, A would pay B a fixed sum, has been upheld. (*Lindell v. Rokes*, 60 Mo. 249.) In such a case there is no restraint upon B,—he can use liquor if he chooses, but in that case he does not get the benefit of the contract. A cannot compel B to refrain from the use of liquor,—this is the test of the restraint. Neither in the case at bar could plaintiff restrain Eliza Roy from getting into debt when she chose to do so,—but if she did so, she was not to have the benefit of the release.

2. The Supreme Court erred in not holding and deciding that the failure of defendants to give notice of their intention to rely upon the defense of illegality as required by Rule 4 of the Circuit Court Rules, barred defendants and the court from considering such defense in this cause.

Said Rule 4 of the Circuit Court Rules reads as follows:

“In personal actions, the statute of limitations shall be specially pleaded, and no defendant shall be allowed to set up by way of defense to plaintiff’s claim, any illegality, fraud, release, payment, infancy, coverture or discharge under any statute relating to bankruptcy or insolvency, unless he shall on filing his answer, give notice within his answer or at the foot thereof, of his intention to rely upon the same.”

No notice of their intention to rely upon the defense of illegality as required by the aforesaid rule was given by defendants. Further, “the point that the contract is illegal was not raised in the trial court by demurrer, answer or otherwise, nor have the appellees urged it in this court.” (Robertson, C. J., in his dissenting opinion, Record, p. 157.)

By Section 2283 of the Revised Laws of Hawaii, 1915, the judges of the several Circuit Courts of the Territory, with the approval of the Supreme Court, have power to make rules for regulating the practice and conducting the business of the Circuit Court.

Section 2370 of the Revised Laws of Hawaii, 1915, is as follows:

“Section 2370. Notice of defenses; rules. The respective courts of record shall have power to make such general and special rules, and orders, respecting notice to the opposing party, of matters intended to be given in evidence by either party to a suit, as shall be necessary to prevent surprise, and to afford an opportunity for preparation for trial.”

In the Opinions of the Justices of the Supreme Court re Military Act, given in 7 Haw. 769, that the legislature had the right to delegate to the courts the

power to make rules regulating the practice of said courts, is recognized.

In *Paakuku vs. Komoikehuchu*, 3 Haw. 642, it was decided that the rules made in pursuance of statute have the force of law.

In *Pahia vs. Maguil*, 11 Haw. 530, 533, the Supreme Court of Hawaii enforced the rule. "The defendant not having pleaded these defenses * * * could not avail himself of the defence of * * * illegality in the contract." (See also *Sherman vs. Harrison*, 7 Haw. 663; *Piipiilani vs. Houghtailing*, 11 Haw. 100; *Kapela vs. Gilliland*, 22 Haw. 655 (1915).)

As the rules in force when the action was brought were approved by the Supreme Court of the Territory of Hawaii on the 12th day of January, 1914, long after the case of *Pahia vs. Maguil* was decided, the necessity for the rule and the justice of the decision, were recognized.

The object of the rule, in the words of Section 2370 of the Revised Laws of Hawaii, 1915, was "To prevent surprise and to afford an opportunity for preparation for trial."

It is not enough that the illegality in the contract appears upon the face of the complaint: the rule requires that if the defendant desires to set up illegality as a defense he must give notice "of his intention to rely upon the same."

It was therefore error for the court in the case at bar to consider such defense, for

(1) The court overruled *Pahia vs. Maguil* without apparently being aware of the fact;

(2) Defendants have not raised the point in any form;

(3) Plaintiff has had no opportunity of showing any evidence in avoidance of what the majority of the court thought was the illegality of the instrument.

(1) The court overruled *Pahia vs. Maguil* without apparently being aware of the fact.

In none of the opinions was the case of *Pahia vs. Maguil* mentioned nor indirectly referred to, nor the suggestion made that the Justices had any intention of overruling the decision in that case.

However, “a decision in conflict with prior decisions and not supported by reason or authority will not be adhered to where it is not probable that property rights will be seriously affected.”

11 Cyc. 745, note 77, and the cases there cited.

In a number of cases it has been decided that a “decision rendered by a divided court is not generally considered obligatory as a precedent.”

Hanifen vs. Armitage, 117 Fed. 845.

A fortiori, a decision by a divided court, should not overrule a decision of a full court.

(2) Defendants have not raised the point in any form.

(3) Plaintiff has had no opportunity of showing any evidence in avoidance of what the majority of

the court thought was the illegality of the instrument.

Chief Justice Robertson deals with these two points so well in his dissenting opinion that we shall content ourselves with subjoining an extract from it:

“The point that the contract is illegal was not raised in the trial court by demurrer, answer or otherwise, nor have the appellees urged it in this court. But it is said that the condition of the release is in and of itself contrary to public policy, and that it is the duty of this court upon its own motion to decline to enforce it. The principal opinion seems to concede, however, that if the provision as to incurring indebtedness in excess of \$1,000 was a ‘benefit’ to the plaintiff, or if she might ‘suffer by the breach’ of the contract, or if it was a ‘reasonable restraint,’ or if the restraint was not ‘larger than what was required for the necessary protection’ of the obligee, it would not render the condition invalid. Yet, by affirming the judgment of the circuit court, this court precludes the plaintiff from the opportunity of showing, if she could, that the restraint was reasonable, or that the condition was a benefit to her and that she would suffer by its breach. She is practically denied her day in court on that matter. The case of *Notley v. Notley*, cited in the principal opinion, was an equity appeal, the entire case was before this court upon the facts as well as the law, and the conclusion of this court was based upon evidence contained in the record. This case seems to be decided

upon a lack of evidence upon a point which was not agitated in the trial court.”

CONCLUSION.

For the reasons hereinbefore set forth, it is respectfully submitted that the judgment heretofore entered on behalf of the defendants-in-error should be reversed.

Respectfully submitted,

HENRY HOLMES,

CLARENCE H. OLSON,

Attorneys for Plaintiff-in-Error.

**IN THE UNITED STATES CIRCUIT COURT
OF APPEALS**

FOR THE
NINTH CIRCUIT

CAROLINE J. ROBINSON,

Plaintiff-in-Error,

vs.

LORRIN A. THURSTON and JOHN D. PARIS,
Executors under the Will of **ELIZA ROY**, de-
ceased,

Defendants-in-Error.

BRIEF FOR DEFENDANTS IN ERROR

LORRIN ANDREWS,
WM. B. PITTMAN,
Attorneys for Defendants-in-Error.

FILED
OCT 10 1917
F. B. MONKTON,
CLERK.

NO. 3038

IN THE UNITED STATES CIRCUIT COURT
OF APPEALS

FOR THE

NINTH CIRCUIT

CAROLINE J. ROBINSON,
Plaintiff-in-Error,

vs.

LORRIN A. THURSTON and JOHN
D. PARIS, Executors under the
Will of ELIZA ROY, deceased,
Defendants-in-Error.

*Error to
the Supreme
Court of the
Territory of
Hawaii.*

BRIEF FOR DEFENDANTS IN ERROR

As plaintiff, in her opening brief, has stated the facts fully, we will confine our argument to a discussion of the law involved.

ARGUMENT.

Plaintiff calls attention to the fact that the trial court and Supreme Court differed as to the validity of the CONDITION SUBSEQUENT of said release; the lower court holding it void, the Supreme Court holding it valid.

As the invalidity of the condition subsequent of said release was the main point relied upon by the defendants at the trial of cause, we will take the liberty of citing authorities in support of our contention *that the condition subsequent was void and the release absolute.*

AUTHORITIES HOLDING CONDITION SUBSEQUENT VOID AND RELEASE ABSOLUTE.

In the case of *Fitzsimmons v. Ogden*, 7 Cranch 219 (Law Ed. 355), the court, in speaking of the effect of a release, said:

“But it is contended that the consideration for the release was the trust declared by G. Morris in August, 1799, or acquiesced in by him under the agreement of the 16th of September, and that his breach of trust in selling the judgment to the Holland Co. with a view to the intended purchase of the lands in dispute by them, did away with the effect of the release previously executed by R. Morris. That this was a legal consequence of the breach of trust can scarcely be maintained. *The release being once regularly executed and delivered, could never afterwards be avoided at law by failure of one of the parties to perform an act in consideration of which the release was given.* It could extend no further than to charge G. Morris with a breach of contract, for which he might be personally liable to the party aggrieved.”

The same is true of the case at bar. The failure of Mrs. Roy to perform the acts in consideration of which the release was given, would not avoid the release and such a breach could extend no further than

to charge Mrs. Roy with a breach of contract, for which she would be personally liable.

The court in discussing the effect of a release in the case of *Kingsley v. Kingsley*, 20 Ill. 203, 208, said:

“The controversy in this case grows out of the execution of the release set up by the complainant in his bill and charged to have been executed by the defendant to him. It is no doubt true, and was the agreement, that the notes, on the execution and delivery of which by the complainant to the defendant, the release was executed, should be signed by Francis P. Kingsley as security, both parties expected it. But it was not done; he refused to sign them when presented to him by defendant for that purpose. The release was executed on the delivery of the notes and there is no fraud shown either in the execution or delivery. The most that can be said is that the complainant did not perform his contract, but that does not render the release ineffectual. *The release being once fairly and regularly executed and delivered, could never afterwards be avoided at law by a failure of one of the parties to perform an act in consideration of which the release was given.* It could go no further than to charge the complainant with a breach of contract for which he would be liable.” Citing *Fitzsimmons v. Ogden et al.*, 7 Cranch 219.

The case above cited seems to us to be “on all fours” with the case at bar. The release was executed under the understanding and agreement that the notes would be signed by Francis P. Kingsley as security. The notes were never signed by Francis P. Kingsley, but nevertheless the court held that it did not avoid the release and that the only right of action the plaintiff had was for a breach of contract.

In the case at bar, when the plaintiff released and discharged the notes she held against Mrs. Roy, *the release was absolute and the notes could not be revived* by the failure of Mrs. Roy to keep the promise which was made in consideration of the release.

The case of *Byrd Printing Co. vs. Whitaker Paper Co.*, 70 S. E. 799, also squarely upholds our contention.

The lower court, in rendering its decision in favor of the defendants, laid great stress upon the case of *Tyson v. Dorr*, 6 Whart. (Pa.) 255, 262-3, which we believe upholds the judgment of the lower court.

In the case of *Tyson v. Dorr*, the court said:

“In *Agnew v. Dorr*, 5 Whart. 131, the assignment required a full and complete release by the creditors. A condition inserted in his release by a creditor, that he should receive twenty-five per cent of his debt, was held to be bad, as not in compliance with the terms of the assignment, and as throwing on the assignees difficulties and embarrassments incompatible with the execution of their trust. But in that case there was no release executed; there was merely a letter written by the creditor, agreeing to become a party to the assignment and release, on condition of the fund paying twenty-five per cent of his claim. This was held to be in its nature merely an executory agreement which could not be enforced without a consideration, and as the creditor could not come upon the fund, his agreement to release would not be enforced. In the present case there is not merely an executory agreement, but a technical release, executed under hand and seal; and the result is different. For, as is said in *Agnew v. Dorr*, it is certain that a technical release will discharge a duty at law, without consideration, and that chancery will not relieve against it, where the releasor has acted with

full knowledge of all necessary circumstances. The release, therefore, is in the present case clearly binding.

"If, then, the release be binding and the condition inoperative, by reason of its repugnancy to the terms of the assignment, and the impossibility that it should be performed, the consequence is, that the release remains single and absolute, and extinguishes the debt. For the principle of law has long been settled, that if one gives an obligation, with condition to be void on the performance of that which is impossible at the time of its execution, the bond is single and it is the same as if there were no condition at all. * * *

"Now, the condition of this release is, that the assignment pays over twenty-five per cent of the claim. But this could never be; for the assignees could not divert the funds from their appropriate channel, which was first to the preferred creditors; next amongst those who executed perfect releases; and lastly, to the assignors. Under no possible circumstances could the assignment pay the releasors anything whatever, if they did not release according to the terms of the assignment; nor could the assignees voluntarily pay any portions, without a breach of their trust, which the law will not suppose beforehand, nor recognize when done as valid in its operation.

"Again, a man cannot release a personal action as an obligation, with a condition subsequent, but the condition will be void; for a personal action once suspended, is extinguished forever: 1 Rol. Ab. 412. For instance, a release, if once operative, cannot be avoided; so that one may make a release to operate on a contingency, but cannot make a release to be void on a condition: 1 Inst. 274, b. *A thing once extinguished cannot be revived; or, in other words, if the release be on a condition subsequent, the release is good, and the condition void; 2 Shep. Touch. by Preston, 325; Law. Lib. 91st, Part 154.* The present is not an instrument by which on a future contin-

gency the release is to become operative; but a release first with a condition which is intended to defeat it subsequently, if the releasor should not receive twenty-five per cent, and the release remains binding, though such condition be never performed."

Tyson vs. Dorr, 6 Whart. (Pa.) 255, 262-3.

The language of the agreement of the release is so very clear and explicit that it should leave no doubt in the minds of the court that the intent of the parties was that the notes were to be satisfied and canceled, and that the promise on the part of Mrs. Roy not to mortgage or transfer her property or incur an indebtedness exceeding the sum of \$1000.00, without the consent of plaintiff, was only a consideration for the execution of the release.

The language of the release shows clearly that Mrs. Roy and plaintiff, by said so-called release, came to an accord concerning the previous execution of the notes in question and also came to a satisfaction of said notes. The law is well settled that an accord and satisfaction wipes out and discharges the obligation in respect to which the accord and satisfaction are arrived at. An accord and satisfaction generally includes a new agreement, i. e., that the creditor shall accept some different character of payment or of services from the debtor than the sum or services provided for in the original agreement.

The plaintiff, in consideration of \$10.00, released and discharged the notes. The agreement of Mrs. Roy not to sell or mortgage her property or to incur an indebtedness exceeding \$1000.00 was simply an

additional consideration for the release and discharge and could not, by the most violent construction, revive the notes in the event Mrs. Roy violated her agreement with plaintiff by selling or mortgaging her property or incurring an indebtedness exceeding \$1000.00.

ESTOPPEL.

The ratification by plaintiff of the transfers made by Mrs. Roy subsequent to the execution of the release in question, naturally led Mrs. Roy to believe that plaintiff no longer relied upon the clause in the release providing that she (Mrs. Roy) should not sell or mortgage her property, or incur an indebtedness amounting to more than \$1000.00 without the written consent of plaintiff. It must be evident to this Court that Mrs. Roy would not have incurred an indebtedness of \$1000.00 had she not been influenced by the ratification by plaintiff of the transfers she (Mrs. Roy) had made, and believed that plaintiff no longer objected to her handling her property as she saw fit.

“When a party intends to rescind a contract on the ground of the violation of it by the other party, he must do so promptly on the first intimation of such breach. If he negotiates with the other party, with knowledge of the breach and permits him to proceed with the performance, it is a waiver of the right to rescind the contract.”

Lawrence v. Dale, 3 Johns C. H. 23.

“If, however, a party having an interest to prevent an act being done, acquiesce in it and the position of

others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license.”

16 Cyc. 741.

“Where a person with actual or constructive knowledge of the facts, induces another by his words or conduct to believe that he acquiesces or ratifies a transaction, or that he will offer no opposition thereto, and that other, relying upon such belief, alters his position, such person is estopped from repudiating the transaction to the other’s prejudice.”

16 Cyc. 791.

“While waiver is not in the proper sense of the term a species of estoppel, yet where a party to a transaction induces another to act upon the reasonable belief that he has waived or will waive certain rights, remedies or objections which he is entitled to assert, he will be estopped to insist upon such rights, remedies or objections to the prejudice of the one misled.”

16 Cyc. 805.

“When a party having objections to a contract afterwards, without fraud or duress, ratifies the same, he has no claim for relief.”

Perry v. Pierson, 30 Ill. App. 389.

Edwards v. Hanley, 3 Ky. 602.

Edwards v. Roberts, 15 Miss. 544.

STATUTE OF LIMITATIONS.

We wish to call the Court’s attention to the fact that the original indebtedness was only \$5875.00, whereas the interest amounts to approximately \$16,000.00. Although the notes were outlawed at the time the release was entered into, the plaintiff con-

tends that the release took the notes out of the statute of limitations and that if Mrs. Roy at any time during her life, even if twenty years after the execution of the release, should mortgage or sell her property or incur an indebtedness of \$1,000.00, the notes would immediately become due and payable. The statute of limitations would have no force or effect, if this Court should sustain such a contention.

Does this Court believe for one moment that Mrs. Roy ever intended to enter into a contract with her daughter whereby the notes could be revived at any time during her life? Why should she enter into such an agreement when she must have known the notes were outlawed and that she did not have to pay them unless she so desired? It is very evident that she executed the release simply because she desired to abide by the wishes of her daughter in not mortgaging or selling her property or incurring an indebtedness of more than \$1000.00, and that she did not intend by such release, under any circumstances, to renew the notes which the plaintiff had by plain and clear language discharged and which Mrs. Roy knew were outlawed.

We do not believe that this Court will, on such a state of facts, hold that the statute of limitations was extended indefinitely and that the acts of Mrs. Roy renewed and revived the obligation which had been so solemnly discharged by the plaintiff.

DISCUSSION OF PLAINTIFF'S AUTHORITIES.

Plaintiff's entire argument and the authorities cited in support thereof are based upon the assumption that contracts in restraint of trade are only void when they refer to commercial business or a profession and that courts recognize that the restraining of an individual in his right of contract—no matter how severe, unreasonable and unconscionable—is valid; but plaintiff has failed to cite any cases holding that such is the law.

The case of *Hubbard v. Miller*, 25 Mich. 15, cited on page 14 of plaintiff's brief, even if it were good law, would not be applicable in the case at bar because the restraining of Mrs. Roy from contracting a debt of more than \$1000.00, or from disposing of any of her realty, was not just or honest or for the protection of the legitimate interests of Mrs. Roy; but was forced upon her by the plaintiff, her daughter, for the sole purpose of preventing Mrs. Roy from disposing of her property as she saw fit, in order that she, the plaintiff, might benefit as an heir of Mrs. Roy on her death.

Plaintiff admits on page 14 of her brief that the main question is whether the restraint is itself the main object of the contract or ancillary to a main lawful purpose, and that if the restraint itself is the main object, then it would be against public policy and could not be enforced. Certainly, no one could successfully contend that the restraining of Mrs.

Roy from disposing of her property was not the main object of the contract entered into by and between plaintiff and Mrs. Roy. The claim of plaintiff against Mrs. Roy was outlawed at the time the release in question was entered into and could not be enforced by plaintiff, and the only object plaintiff could possibly have had was to prevent Mrs. Roy from disposing of, or incumbering, her property or incurring indebtedness in order that she (plaintiff) might benefit thereby as one of Mrs. Roy's heirs.

The viciousness of the release was the fact that there was no consideration for its execution. Mrs. Roy did not receive or derive any benefit whatsoever, directly or indirectly, by the execution of the release.

Certainly there can be no merit to the contention of plaintiff that the common law governing the restraint of trade does not apply to an individual; but only to those who are engaged in commercial or professional business. It is just as important to the public that individuals not engaged in any particular business have the same freedom of contract as those engaged as tradesmen. The courts certainly could not make any valid distinction.

Plaintiff seems to place great reliance upon the fact that the release was a transaction between two individuals and, therefore, could not possibly have any injurious influence on the community at large. We are unable to follow any such specious reasoning, as the public is interested materially in seeing that every citizen is allowed to transact business

with whom they please, so long as the transaction is lawful; otherwise, contracts of this kind might seriously clog the channels of business in any community.

Justice Coke in rendering his decision in this case, which was concurred in by Justice Quarles, holding that the release was in restraint of trade and against public policy and therefore void, cites the following references:

“No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out; nor can he set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim.” 9 Cyc. 546. See also *Pocahontas Coke Co. v. Powhatan Coal & Coke Co.*, 56 S. E. 264.

“Under the principles relating to the doctrine of public policy, as applied to the law of contracts, courts of justice will never recognize or uphold any transaction which in its object, operation or tendency is calculated to be prejudicial to the public welfare.” 6 R. C. L. 712.

“Whether a contract is against public policy is a question of law for the court.” 9 Cyc. 483.

“The * * * question is, whether this is a reasonable restraint of trade. And we do not see how a better test can be applied to the question whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party *in favour of whom it is given*, and not so large as to interfere with the interests of the public. Whatever restraint *is larger than the necessary protection of the party, can be of no benefit to either*; it can only be oppressive; and if

oppressive, it is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void, on the grounds of public policy." *Horner v. Graves*, 151 Eng. Rep. 287; 6 R. C. L., p. 789.

Justice Coke, in speaking of the reasons for the release being void and against public policy, says :

"The growth of commerce and the usages of trade demand a free exercise of the right to extend credit and to have credit extended; to enjoy the right to borrow as well as the right to lend; and unless there appears some clear and positive benefit to accrue to the covenantee by reason of the subversion of these rights, a contract to that effect will be held an unreasonable restraint of trade and void because against public policy.

"The state has a general interest in the freedom of its people in the exercise of their legal and natural rights and any contract that tends to curtail those rights without any benefit to the restrainer is against public policy. The right to borrow has been recognized for ages. The commerce of the world is conducted largely on credit, and while the disposition to incur indebtedness may in some instances prove harmful, yet the right to borrow is universally recognized as a valuable privilege often indulged, and not infrequently to the great benefit and advantage of the borrower. It is not an over-statement to say that countless firms and individuals and even nations, are constantly being saved from financial wreck and disaster by timely recourse to this privilege."

THE FACTS IN THE CASE AT BAR SHOW THE RESTRAINT TO BE UNREASONABLE, UNJUST AND INJURIOUS TO THE PUBLIC.

Every authority cited by plaintiff enunciates the principle that a restraint of the right of contract to

be valid must be just, honest and for the protection of the legitimate interests of the party in whose favor the restraint is imposed. None of these elements necessary to constitute a valid restraint can be found in the case at bar, as is apparent from the following facts:

1. That at the time the release was executed by plaintiff and Mrs. Roy the notes were outlawed and there was no reason for the execution of the release, other than the unlawful restraining of Mrs. Roy from the exercise of her right of contract;

2. That Mrs. Roy did not at the time of the execution of said release, or at any time subsequent thereto, receive any benefit or consideration of any nature whatsoever for the execution of the same;

3. That the only party receiving any benefit whatsoever from the execution of said release was the plaintiff, who would benefit as an heir of Mrs. Roy by preventing Mrs. Roy during her lifetime from disposing of or incumbering her estate;

4. That said release was unreasonable in that it prevented Mrs. Roy from disposing of any of her property or incurring an indebtedness of over \$1000.00 at any time during her lifetime without the consent of plaintiff; thereby abridging her natural right of contract;

5. That said release was unjust, unreasonable and unconscionable in that it prevented Mrs. Roy from incurring any indebtedness over \$1000.00 should it become necessary to protect her estate;

6. That the only and sole purpose and object of

said release was the restraining of Mrs. Roy from disposing of her property or incurring an indebtedness of over \$1000.00 without the consent of plaintiff;

7. That prior to the time said alleged indebtedness of over \$1000.00 was incurred by Mrs. Roy, plaintiff had ratified sales of property which she (Mrs. Roy) had made without the consent of plaintiff and, by such ratification, led and induced Mrs. Roy to believe that plaintiff no longer relied upon the conditions subsequent of said release;

8. That said release affected the public materially and was against public policy as it prevented Mrs. Roy from exercising her innate right of contracting with whom she pleased.

We are unable to cite the pages of the transcript of evidence showing the facts above stated, as we have been unable to obtain a copy of the same. However, we will endeavor to point out to the Court in our oral argument the facts appearing in the transcript substantiating the aforesaid statements.

If the contract entered into by and between plaintiff and Mrs. Roy is not against public policy and void, as being in restraint of trade, then it would be possible for a few wealthy and influential men to clog the channels of trade to such an extent that the commercial business of a community would become stagnant. One would think from the argument of plaintiff that all of the business of the world was done by professional men and tradesmen and that individuals took no part in commerce. Right here

in our small community we have men who are not in any manner whatsoever connected with a trade or a profession, yet they are transacting business deals daily involving many thousands of dollars. Would it be any more harmful to the public to tie up a groceryman and prevent him from trading than it would be to tie up one of these wealthy men and prevent him from doing business?

The principles and reasons for prohibiting contracts in restraint of trade are as much applicable to individuals as to tradesmen. Simply because we are unable to find a case "on all fours" with the one at bar does not weaken our argument in the least that every case cited by plaintiff in support of her contention, upholds the opinion of our Supreme Court THAT THE CONTRACT ENTERED INTO BETWEEN PLAINTIFF AND MRS. ROY WAS VOID, AS BEING AN UNREASONABLE RESTRAINT OF TRADE AND AGAINST PUBLIC POLICY. No doubt, our failure to find a case directly in point is due to the fact that plaintiff is the only one who has ever endeavored to uphold in a court of law such an unreasonable, unconscionable and unfair restraint.

AUTHORITIES UPHOLDING DEFENDANTS' CONTENTION THAT THE RELEASE IS VOID AND AGAINST PUBLIC POLICY, BEING A RESTRAINT OF TRADE.

Chitty, in speaking of agreements in restraint of trade, said:

“An agreement to be good *must not be unreasonable*, that is, the restraint imposed must not be larger than is required for the necessary protection of the party with whom the contract is made, and when the agreement imposes a restraint larger than this, *it is unreasonable and void as being injurious to the interests of the public*. The reasonableness or unreasonableness of a contract is not a matter to leave to the jury, but a point of law for the court.”

Chitty on Contracts, p. 576.

As we have discussed fully the unreasonableness of the release and its injurious nature to the public, we will not further burden the Court by reiterating.

Parsons on Contracts (7th Ed., Vol. 2, p. 753) says that an agreement not to carry on a certain business within the state is void as being against public policy and an unreasonable restraint.

The contract entered into between the plaintiff and Mrs. Roy, not only prohibited Mrs. Roy from incurring an indebtedness of more than \$1000.00 and from transferring her property within the Territory of Hawaii without the consent of plaintiff; but prohibited her from incurring any indebtedness exceeding \$1000.00 or from transferring any of her property in any place in the United States or, for that matter, in the world. If such a restraint is not unreasonable, unconscionable and against public policy, then we are at a loss to know when a restraint would be against public policy and void.

Waldo Pollack in his work on contracts (3rd Ed.,

p. 468), in discussing this question, lays down the following proposition:

“As the law is laid down now, it is sufficient justification and, indeed, the only justification *if the restriction is reasonable*, that is, *in reference to the interests of the parties concerned and reasonable in reference to the interests of the public*.

“An agreement between several master manufacturers to regulate their wage and hours of work, the suspending of work partially or altogether, and the discipline and management of their establishment by the decision of the majority of their number, is in general *restraint of trade* as depriving each one of them of the control of his own business.

In the case of *Mitchell v. Reynolds*, ... Mass. (1837), the court sets forth the following reasons for not allowing unqualified restraint:

“1. Such contracts injure the parties making them because they diminish their means of procuring livelihoods and a competency for their families; they tempt incompetent persons, for the sake of gain, to deprive themselves of the power to make future acquisitions and they expose such persons to imposition and oppression. 2. They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community, as well as themselves. 3. They discourage industry and enterprise and diminish the products of ingenuity and skill. 4. They prevent competition and enhance prices. They expose the public to all the evils of monopoly.”

As the release entered into between plaintiff and Mrs. Roy tied her hand and foot so far as the handling of her property was concerned, it certainly discouraged industry and enterprise; prevented com-

petition and exposed the public to the evils of monopoly. When Mrs. Roy's property was taken off the market by the unreasonable restraint imposed upon her by plaintiff, it naturally increased the value of other property. In other words, if such a contract was entered into by a hundred persons in a community holding large interests, it would amount to practically a monopoly and greatly increase the saleable value of other property in that locality.

In the case of *Pipe v. Thomas*, 7 Am. Dec. 741, it was held:

“An agreement to restrain a party from pursuing his trade in any part of the country, is void, as against public policy.”

The following cases hold that whether a contract in restraint of trade shall be valid or not depends upon three considerations. 1. If the restraint be partial; 2. If founded upon a good consideration; and 3. If it be reasonable and not oppressive.

Thomas v. Miller, 3 Ohio St. 275.

Bremer v. Marshall, 4 Green Ch. 537.

Wright v. Ryder, 36 Cal. 357.

Holbrook v. Waters, 9 How. Pr. 353.

In *Callahan v. Donnelly*, 45 Cal. 152, it was held that a contract in restraint of trade must designate the space within which it is to operate; it must not be unreasonably extended. Such contracts, when upheld, are only in cases *where the parties have restricted the territory* in which they are to operate,

and where the court, in considering the nature of the business in connection with the territorial limits assigned, is of the opinion that the designated limits are not unreasonable in extent, so, that whether a contract is in restraint of trade or not, is a question of law, to be determined by the court and not a question for the jury.

Mallan v. May, 11 M. & W. 653.

Keller v. Larkin, 3 Chand. 133.

Horner v. Graves, 7 Bing. 743.

The following cases hold that contracts in general restraint of trade are void at common law :

Pike v. Thomas, 7 Am. Dec. 741 ;

Alger v. Thatcher, 31 Id. 119.

Plaintiff also raises the point that because Mrs. Roy could, by electing to pay the notes, transfer her property and incur an indebtedness exceeding \$1000.00, that *it was not in any way a restraint of her right to contract.*

The case of *DePeyster v. Michael*, 57 Am. Dec. 471, discusses this question thoroughly and lays down the law that the condition that a grantee shall not alien without paying a sum of money therefor is an unlawful restraint of alienation. The court in the conclusion of its opinion, says :

“Upon the highest legal authority, therefore, it may be affirmed that in a fee-simple grant of land, a condition that the grantee shall not alien or that he shall pay a sum of money to the grantor upon alienation, is void on the ground that it is repugnant to the estate granted.”

The same reasoning would apply to contracts in the restraint of trade. The mere fact that a party could, by paying a fine, avoid the restraint, would not validate the contract and take it out of the rule that it is against public policy. There is always bound to be some condition of forfeiture to every restraint. It would be impossible to restrain a man from doing something without providing for some penalty in the event he disobeyed the contract of restraint.

If the Court will read the DePeyster case, it will find the question discussed thoroughly.

Plaintiff also raises the point, and seems to lay great stress upon it, THAT THE SUPREME COURT ERRED IN NOT HOLDING AND DECIDING THAT THE FAILURE OF DEFENDANTS TO GIVE NOTICE OF THEIR INTENTION TO RELY UPON THE DEFENSE OF ILLEGALITY AS REQUIRED BY RULE 4 OF THE CIRCUIT COURT RULES, BARRED DEFENDANTS AND THE COURT FROM CONSIDERING SUCH DEFENSE IN THIS CAUSE, citing *Pahia v. Maguil*, 11 Haw. 530, 533.

The case cited by plaintiff is not in point because, in that case, the defendant endeavored to set up as a defense an immoral consideration, without pleading it in his answer. In the *Pahia* case there was nothing on the face of plaintiff's complaint showing that the contract was based on an immoral consideration and, naturally, the plaintiff had no notice that the defendant intended to rely upon such a defense, hence it was incumbent upon the defendant to plead

it. The same is true of the case of *Kapela v. Gilliland*, 22 Haw. 655.

The facts in the case at bar are not at all similar to the facts in the Pahia case, because plaintiff's complaint shows on its face that the contract under which she was endeavoring to collect the notes was in restraint of trade and against public policy, and it was not necessary for the defendants to set up a defense of which plaintiff already had knowledge.

We wish to call attention to the following extracts from the opinion of the Supreme Court of the Territory of Hawaii in the case at bar, on this phase of the question, which, in our humble opinion, settles the question so far as this Court is concerned, notwithstanding the Paia and Kapela cases:

COKE, J: "There is another phase of this case which, while almost ignored in the court below and in the briefs and argument of counsel before this court, demands consideration, and that is the question of the validity of the clause in the agreement between Eliza Roy and plaintiff herein restraining Eliza Roy from incurring indebtedness at any one time to the amount of one thousand dollars or upwards without the written consent of plaintiff. Under other circumstances we might feel constrained to ignore all questions not properly urged for our consideration by counsel. But in this case the agreement is before us and plaintiff can only prevail upon its strength and validity. If we find that the condition in the agreement, for the violation of which plaintiff must depend solely for judgment

in this case, is for any reason void, we conceive it to be our duty to so declare.”

“No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out; nor can he set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim.” 9 Cyc. 546. See also *Pocahontas Coke Co. v. Powhatan Coal & Coke Co.*, 56 S. E. 264.

“Under the principles relating to the doctrine of public policy, as applied to the law of contracts, courts of justice will never recognize or uphold any transaction which in its object, operation or tendency is calculated to be prejudicial to the public welfare.” 6 R. C. L. 712.

“Whether a contract is against public policy is a question of law for the court.” 9 Cyc. 483.

It seems to us that as the law is so well settled as to what contracts are in restraint of trade and against public policy, it would only be taking up the time of this Court to cite any further authorities. Any authorities that might be cited, either by the plaintiff or the defendants in this case, would not, in our humble opinion, throw much light on the question involved, as it is largely a question of fact, more than one of law, as to whether or not a contract is in restraint of trade and against public policy.

Although we do not have the transcript of evidence to refer to, we have endeavored to quote the evidence correctly and show that the contract entered into between plaintiff and Mrs. Roy was unreasonable, in restraint of trade and against public

policy. Mrs. Roy received absolutely no consideration whatsoever for the execution of the instrument, and not only tied herself up in a contract whereby she was prohibited from exercising her innate right of contract, but signed an agreement purporting to renew notes which were outlawed and which she did not have to pay. It should not be overlooked that although the original claim of plaintiff was only about \$5000.00, at the present time the interest has brought it up to approximately \$20,000.00.

The restraint was not limited to time or place; but was so broad and extensive in its terms as to prohibit Mrs. Roy from incurring an indebtedness of over one thousand dollars during her lifetime without the consent of plaintiff. If this contract is not unreasonable, unjust and unconscionable, then we would appreciate it if counsel for plaintiff would point out one that is.

CONCLUSION.

We most respectfully submit that, in view of the facts in this case and the law governing the same, the judgment in behalf of the defendants should be sustained.

Respectfully submitted,

LORRIN ANDREWS,

WM. B. PITTMAN,

Attorneys for Defendants-in-Error.

Dated, Honolulu, T. H.,

October 1, A. D. 1917.

**IN THE UNITED STATES CIRCUIT COURT
OF APPEALS**

**FOR THE
NINTH CIRCUIT**

CAROLINE J. ROBINSON,

Plaintiff-in-Error,

vs.

LORRIN A. THURSTON and JOHN D. PARIS,
Executors under the Will of ELIZA ROY, de-
ceased,

Defendants-in-Error.

**REPLY BRIEF FOR PLAINTIFF IN
ERROR**

HENRY HOLMES,
CLARENCE H. OLSON,
Attorneys for Plaintiff-in-Error.

FILED

OCT 15 1917

U. S. DEPARTMENT OF JUSTICE

CLERK

NO. 3038

IN THE UNITED STATES CIRCUIT COURT

OF APPEALS

FOR THE

NINTH CIRCUIT

CAROLINE J. ROBINSON,
Plaintiff-in-Error,

vs.

LORRIN A. THURSTON and JOHN
D. PARIS, Executors under the
Will of ELIZA ROY, deceased,
Defendants-in-Error.

*Error to
the Supreme
Court of the
Territory of
Hawaii.*

REPLY BRIEF FOR PLAINTIFF IN
ERROR

The answer of defendants to the several contentions made in our opening brief in this cause, we find to be as follows:

1. That if a release be upon condition subsequent, the condition is void and the release absolute. (Brief, pp. 1-6.)

2. *In re Estoppel.* "The ratification by plaintiff of the transfers (of land) made by Mrs. Roy subsequent to the execution of the release * * * led

Mrs. Roy to believe * * * plaintiff no longer relied upon the clause in the release" * * * (Brief, p. 7.)

3. *In re Statute of Limitations.* "The statute of limitations would have no force or effect, if this court should sustain such a contention," viz: "that if Mrs. Roy at any time during her life, even if twenty years after the execution of the release, should mortgage or sell her property or incur an indebtedness of One Thousand Dollars (\$1,000) the notes would immediately become due and payable." (Brief, p. 9.)

4. *In re Accord and Satisfaction.* "Mrs. Roy and plaintiff * * * came to an accord concerning the previous execution of the notes * * * and also came to a satisfaction" thereof. (Brief. p. 6.) "The agreement * * * could not * * * revive the notes," etc. (Brief. pp. 6 and 7.)

5. That the rules of law governing contracts in restraint of trade have application in this case. (Brief, pp. 16-24.)

6. "The mere fact that a party could, by paying a fine, avoid the restraint, would not validate the contract, and take it out of the rule that it is against public policy." (Brief, p. 21.)

7. It is not necessary to give notice of an intention to rely on the defense of illegality when the instrument—on the validity of which plaintiff must depend for judgment—is attached to the complaint. (Brief, p. 21.)

These several answers will be discussed in their order.

1. That if a release be upon condition subsequent, the condition is void and the release absolute. This contention of defendants was considered by the three Justices of the Supreme Court to be no longer, if it ever was, the law.

DISCUSSION OF AUTHORITIES CITED BY DEFENDANTS.

Fitzsimmons v. Ogden (7 Cranch 2, at 19, 3 Law Ed. 255).

In this case a stay of execution had been secured, and, as a writ of execution was issued before the date to which this stay was to run, the Court was forced to presume in favor of the regularity of the proceedings that a full release had been given. It will be noted that this fact is *presumed*, and that no release is actually before the Court. And the Court *after assuming that there was a full and regular release*, says it could not be avoided at law by a failure of one of the parties to perform an act in consideration of which it was given. There is no mention of a release upon condition subsequent, or the legal effect of such a release.

Kingsley v. Kingsley (20 Ill. 203 at p. 208).

A written release was given in this case, and its terms contained no reference to a condition of any kind. The most that can be said, and the Court so states, is that the parties may have *orally* understood that a third party was to endorse the notes. There being no condition in the release, the Court had no option but to declare the release absolute.

“A release by its own operation extinguishes a pre-existing right, and cannot be controlled or explained by parole.” *Sherburne v. Goodwin* (44 N. H. 271-277).

In *Byrd Printing Co. v. Whitaker Paper Co.* (70 S. E. 799, 135 Ga. 865, 22 Ann. Cas. 1912A 182), the Court held that the agreement “was not a mere agreement of accord which would become satisfaction * * * upon the performance of the agreement, but was itself a complete accord and satisfaction.” The Court then said that the proper procedure was a suit on the check and not on the original obligation, which had been discharged by the agreement. We find no mention of a condition of any kind on the happening of which the parties were to be restored to their former status.

In *Tyson v. Dorr* (1841, 6 Whart. (Pa.) 255, 262, 3) the Court first held that the condition annexed to the release was impossible of performance, after which the Court cited, as an additional reason for holding the condition void, a side-note by the author, Preston, in his work entitled “*Sheppard’s Touchstone* by Preston,” vol. 2, 325. But a careful reference to Coke’s Inst. 1, 274-b, upon which Preston relied, does not show that it is an authority for the assertion of the author Preston. And, indeed, on page 323 we find a statement by the older author Sheppard which appears to be in conflict with the later author, Preston.

But regardless of the apparent inconsistencies of the last mentioned work,—we may note that *Tyson v.*

Dorr, an American case, was decided in 1841, and relies upon a side-note in a work on English law published in 1821.

After these dates we find that the highest courts of England held that a release upon condition subsequent was avoided by the breach of the condition. *Newington vs. Lery*, 1870, 5 L. R. C. P. 607; and on appeal, 6 L. R. C. P. 180; *Hall v. Lery*, 1875, 10 L. R. C. P. 154. Other authorities to the same effect are: Addison on Contracts, vol. 2, pt. 2, 836 and 838; *Belshaw v. Bush*, 11 C. B. at p. 201; *Whitney v. Whitaker*, 1841, 2 Met. 268; *Kingan v. Gibson*, 1870, 33 Ind. 53.

2. *In re Estoppel*. "The ratification by plaintiff of the transfers (of land) made by Mrs. Roy subsequent to the execution of the release * * * led Mrs. Roy to believe * * * plaintiff no longer relied upon the clause in the release." (Brief. p. 7.)

This point also was raised by defendants in the Supreme Court and received no mention by the Justices in their several opinions.

A sufficient answer to this contention is that nowhere in the transcript is there evidence that Mrs. Roy was "led to believe" that plaintiff would no longer rely upon the agreement.

"It is necessary to establish not only the fact of misrepresentation or concealment, but also * * * that it has actually misled him." (Bigelow on Estoppel, 6th Ed., 604.)

Far from leading Mrs. Roy to believe she would no longer rely on the agreement, the fact, as shown

in the evidence, is, that plaintiff “took the first steamer that left here” (Transcript, p. 11) for Kona (where Mrs. Roy lived) and said to her mother, “You have broken our agreement.” (Tr., p. 12.) And before ratifying the deed from Mrs. Roy to Willie Roy, insisted that her two sisters, Mrs. White and Mrs. Wall, and Willie Roy, be treated “alike, and share and share alike.” (Tr., p. 9.)

Moreover, even if the fact had been shown that plaintiff waived the condition which provided that if Mrs. Roy conveyed land without plaintiff’s consent the notes and mortgages were to be revived—how could a waiver of such condition induce Mrs. Roy to break the other condition, viz.: to incur an indebtedness in excess of \$1,000? But as a fact what plaintiff did was to ratify, *for the benefit of the grantee*, as all ratifications are, the deed which Mrs. Roy gave him, and which was defective by reason of the existence of the mortgages which plaintiff held over the land conveyed.

3. *In re Statute of Limitations*: “The Statute of Limitations would have no force or effect, if this Court should sustain such a contention,” viz: “that if Mrs. Roy at any time during her life, even if twenty years after the execution of the release, should mortgage or sell her property or incur an indebtedness of One Thousand Dollars (\$1,000) the notes would immediately become due and payable.” (Brief, p. 9.)

Counsel made this same contention in the Supreme

Court, but we do not find that the several justices agreed with them.

In our view of the law on this point, it would be reasonable and legal for Mrs. Roy to make an agreement to pay a certain sum of money at any time within her life time. In and by the terms of said agreement, Mrs. Roy admitted the several debts to be "now due and payable to the said Caroline J. Robinson, and doth hereby agree that in case of the violation by her of her said above agreement and covenant, or any part thereof, then and in such case the said indebtedness principal and interest, shall be and become immediately due * * *." The question then, is, what is the relation between such an agreement and the Statute of Limitations? The answer is that the statute has nothing whatever to do with such an agreement until the date when something becomes due under the agreement.

"When the payment of a claim or the liability of a party is made dependent upon the performance of any condition precedent or the happening of any contingency, a right of action does not accrue or the statute begin to run, until the performance of such condition, or the happening of such contingency." (*Segelken v. Hawaiian Trust Co.*, 20 Haw. 225, 229.)

The breach of the condition as to indebtedness occurred "shortly before her (Mrs. Roy's) death," and at that time the Statute of Limitations began to run.

Defendants also state that when this agreement was made (1905) the notes were "outlawed." This statement is gratuitous and appears to be made by

a calculation of dates without taking into account the transactions of the parties.

Moreover, defendants in their answer in the trial court gave notice of their intention to rely on the statute of limitations—and we find no evidence introduced by them to support their contention. For all that appears in evidence then, Mrs. Roy's obligations (prior to the time this agreement was made) may have been kept in full force and effect by new promises to pay, just like the new promise made in this agreement.

And a new promise to pay an admitted obligation, will take the case out of the Statute of Limitations. *Davis v. Mills*, 21 Haw. 167; 25 Cyc. 1067, 1328; 1359; and a moral obligation to pay a debt is a sufficient legal consideration for a subsequent new promise to pay it, made either before or after the bar of the statute is complete. 25 Cyc. 1329.

4. "Mrs. Roy and plaintiff * * * came to an accord concerning the previous execution of the notes * * * and also came to a satisfaction" thereof. (Brief, p. 6.) "The agreement * * * could not * * * revive the notes," etc. (Brief, pp. 6 and 7.)

This is a further point raised by counsel for defendants in the Supreme Court and not mentioned in the several opinions of the Justices.

Where, by the terms of an agreement, there is an express promise by the debtor to pay the old indebtedness on the happening of a future event, and such

event occurs, an action brought thereafter by the creditor on the old indebtedness will lie.

Whitney v. Whitaker, 2 Met. 268;

Kingan v. Gibson, 33 Ind. 53;

Simmons v. Oullahan, 75 Cal. 508;

Hall v. Levy, *supra*.

In the case at bar a suit on the original obligations was the proper procedure. *Whitney v. Whitaker*, *supra*; *Kingan v. Gibson*, *supra*.

Moreover, an accord and satisfaction is a substitution by agreement of the parties of something else in place of the original claim, which *when executed* extinguishes the antecedent liability. (*Boston Mining Co. v. Orme* (Colo.), 71 Pac. 885.) But an accord is *executory* so long as something remains to be done in the future. (*Bragg v. Pierce*, 53 Me. 65.) And it is sufficiently executed only *when all is done* which the party agrees to accept in satisfaction of the pre-existing obligation. (See *Kingan v. Gibson*, *supra*.)

5. That the rules of law governing contracts in restraint of trade have application in this case. (Brief, pp. 16-24.)

In our opening brief (pp. 10 to 18) we attempted to show that the rules of law governing restraints of trade owe their origin to mercantile usage and the interest of the public in seeing that no man is unreasonably restrained from pursuing his trade or calling—and that such rules, adopted for such a purpose, can have no application in a simple contract between an elderly lady and her daughter.

The subject of unlawful agreements is too complex to permit of a studied analysis in this brief. We will therefore refer the Court to Wald's Pollock on Contracts, 3rd Ed., by Williston, page 370, wherein this subject is carefully considered.

It will be noted that the author classified unlawful agreements in the following order :

A. Agreements contrary to positive law—wherein are considered contracts to commit offenses, and contracts prohibited by statute, etc.;

B. Agreements contrary to good morals; wherein contracts having to do with illicit cohabitation and agreements tending to separate married couples, etc., are considered;

C. Agreements contrary to public policy, wherein are considered

(a) Public policy as to external relations of the State (p. 426);

(b) Public policy as touching internal government (p. 434);

(c) Public policy as to legal duties of individuals (p. 461);

(d) *Public policy as to freedom of individual action* (p. 464).

“As to agreements *unduly* limiting the freedom of individual action.

“There are certain points in which it is considered that the choice and free action of individuals *should be as unfettered as possible. As a rule a man may bind himself to do or omit, * * * anything which the law does not forbid to be done or left undone.*

The matters as to which this power is specially limited on grounds of general convenience are :

“(a) Marriage.

“(b) Testamentary dispositions.

“(c) Trade.” (P. 464.)

Agreements in restraint of trade are carefully considered on pages 467 to 481. And with respect to all such agreements it must be observed that they have to do with the sale of a *trade* or *business* and a covenant by the vendor as to his freedom of individual action with respect to such trade or business thereafter. The public is interested in seeing that a skilled artisan, tradesman, or mechanic is not unreasonably restricted in following his occupation, and has therefore established rules of law to govern contracts in restraint of trade.

So we may safely conclude that while the contract in the case at bar is subject to the rule that “ a man may bind himself to do or omit. * * * anything which the law does not forbid to be done or left undone” (Wald’s Pollock, supra, p. 464), it is not to be considered in the light of the special *limitations* upon that rule which have to do with “Marriage, Testamentary dispositions and Trade.” (Id., 464.)

A further matter to be considered is the modern attitude of the highest courts toward that indefinite quantity known as “public policy.”

“The question is, in effect, whether it is at the present time open to courts of justice to hold transactions * * * void simply because in the judgment of the Court it is against the public good that

they should be enforced, although the grounds of that judgment may be novel. *The general tendency of modern ideas is no doubt against the continuance of the jurisdiction.*" (Wald's Pollock, *supra*, p. 421.)

"The prevailing modern view is expressed by the following remarks of the late Sir G. Jessel (*Id.*, p. 425), which remarks have been approved by the Supreme Court of the United States. (See our opening brief, pp. 22 and 23.)

"The wide discretion formerly claimed by the judges in the somewhat analogous field of the law of conspiracy has been finally discredited by the House of Lords as well as the Court of Appeal in the *Mogul Steamship Co.'s case*." (Wald's Pollock, *supra*, p. 426.)

All of which leads us to the conclusion that "Courts are less and less disposed to interfere with parties making such contracts as they choose, so long as they interfere with no one's welfare but their own." (*Daley v. People's B. & L. & S. Assn.*, 1901, 178 Mass. 13, 19.)

6. "The mere fact that a party could, by paying a fine, avoid the restraint, would not validate the contract, and take it out of the rule that it is against public policy." (Brief, p. 21.)

We are inclined to agree with this statement, viz: that if a restraint is in and of itself against public policy "the mere fact that a party could by paying a fine, avoid the restraint, would not validate the contract," etc.

But counsel, in seeking to show that a restraint attached to a contract is illegal, cite as authority a case wherein a condition is attached to a grant of a

fee simple title to land, and argue that because in such case the condition was declared bad, the same reasoning may be used in the case at bar. But this does not follow. For as was said in the case cited (*De Peyster v. Michael*, 57 Am. Dec. 471), “a condition” attached to a grant of a fee “is void on the ground that it is repugnant to the estate granted”; that is, if the condition could stand, the estate granted would not be a fee. The court in the cited case did not say that such a condition, if annexed to a private contract, would not be good,—but only that if annexed to the grant of a fee, it is bad.

7. It is not necessary to give notice of an intention to rely on the defense of illegality when the instrument—on the validity of which plaintiff must depend for judgment—is attached to the complaint. (Brief, p. 21.)

Let us assume A made a contract with B, whereby A is to pay B \$25 if he will hang X. B sues A for the \$25, attaching a copy of the contract to the complaint, and alleging performance. May B succeed in his action?

On its face this appears to be an illegal contract, but unless A pleads illegality B has no chance to show all the facts of the case. The facts may be that A is the acting executioner for the Territory; that X is sentenced to be hanged, and A wanted B to perform A's duty. Is B to be required to introduce every conceivable kind of evidence to meet every conceivable kind of defense that A may rely on—

before he, B, can rest his case? This does not seem fair, and certainly does not tend to aid in the speedy conduct of trials in Courts of Justice.

Rather than proclaim such an unjust rule, the Court in *Pahia vs. Maguil* held that even though from evidence adduced it appeared that plaintiff's services were of an illegal nature,—yet defendant not having given notice of his intention to rely on the defense of illegality (and thereby giving plaintiff an opportunity to show, if she could, matter in avoidance of such plea),—the judgment was for the plaintiff.

This point, however, was fully covered in our opening brief.

Counsel repeatedly mention the fact that the original amount due under the notes was \$5875, and that this amount has been materially increased by interest additions. But is it a hardship upon a mortgagor to pay back money borrowed—which he has had the use of for a long period of time—with interest? As Justice Coke has said in his opinion, “the commerce of the world is conducted largely on credit”—and it should be remembered that commerce could not have been developed had not the law carefully and consistently protected the rights of creditors not only as to the principal sum due, but to interest thereon as well.

For the reasons given in this and our opening brief, it is submitted that an order should be entered directing the Circuit Court of the First Judi-

cial Circuit to set aside the judgment heretofore entered on behalf of the defendants-in-error, and to enter a judgment in favor of the plaintiff-in-error.

Respectfully submitted,

HENRY HOLMES,

CLARENCE H. OLSON,

Attorneys for Plaintiff-in-Error.

Dated at Honolulu this

1st day of October, 1917.

United States
Circuit Court of Appeals 5
For the Ninth Circuit.

QUAN HING SUN and JUNG LIM,
Appellants,
vs.
EDWARD WHITE, Commissioner of Immigration
of the Port of San Francisco,
Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
First Division.

United States
Circuit Court of Appeals
For the Ninth Circuit.

QUAN HING SUN and JUNG LIM,
Appellants,
vs.
EDWARD WHITE, Commissioner of Immigration
of the Port of San Francisco,
Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
First Division.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Amended Praecipe for Transcript on Appeal..	1
Assignment of Errors.....	38
Attorneys, Names of	1
Certificate of Clerk U. S. District Court to Transcript on Appeal	47
Citation on Appeal—Copy.....	40
Citation on Appeal—Original	48

EXHIBITS:

Petitioner's Exhibit "A"—Copy of Rule 9 of the Immigration Rules and Regula- tions	15
Petitioner's Exhibit "B"—Letter Dated May 11, 1916, Edward White to Mc- Gowan and Worley.....	18
Finding	22
Minutes—Re Immigration Record.....	32
Names of Attorneys	1
Notice of Appeal.....	33
Order Allowing Petition for Appeal.....	36
Order Discharging Writ of Habeas Corpus and Remanding Petitioner for Deportation....	32

Index.	Page
Order to Show Cause.....	23
Petition for Appeal.....	35
Petition for Writ.....	2
Return	24
Stipulation and Order Respecting Withdrawal of Immigration Record.....	41
Stipulation and Order Extending Time to Docket Case—Dated February 15, 1917.....	43
Stipulation and Order Extending Time to Docket Case—Dated March 17, 1917.....	44
Stipulation and Order Extending Time to Docket Case—Dated April 14, 1917.....	45
Stipulation and Order Extending Time to Docket Case—Dated May 12, 1917.....	46

Names of Attorneys.

For the Petitioner and Appellant:

GEO. A. MCGOWAN, Esq., San Francisco.

For the Respondent and Appellee:

JOHN W. PRESTON, Esq., U. S. Attorney,
San Francisco, California.

*District Court of the United States, in and for
the Northern District of California, Southern
Division, First Division.*

No. 16,028.

In the Matter of the Application of QUAN HING
SUN, on Habeas Corpus.

Amended Praeceptum for Transcript on Appeal.

To the Clerk of said Court:

Sir: Please make up Transcript of Appeal in the
above-entitled case, to be composed of the following
papers, to wit:

1. Petition for writ of habeas corpus.
2. Letter of Ralston & Richardson attached to
petition.
3. Order to show cause.
4. Return of respondents.
5. Minute order regarding immigration record.
6. Judgment and order dismissing order to show
cause and denying petition for writ.
7. Notice of appeal.
8. Assignment of errors.
9. Petition for appeal.

10. Order allowing appeal.
11. Citation on appeal.
12. Stipulation and order regarding immigration record.
13. Order extending time to docket case.
14. Clerk's certificate.

GEO. A. MCGOWAN,
Attorney for Petitioner. [1*]

Due service and receipt of a copy of the within is hereby admitted this 11 day of May, 1917.

JOHN W. PRESTON,
U. S. Attorney, Northern District of California,
Attorney for Respondent.

[Endorsed]: Filed May 12, 1917. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [2]

*In the District Court of the United States, in and for
the Northern District of California, First
Division.*

No. 16,028.

In the Matter of QUAN HING SUN, on Habeas
Corpus.

Petition for Writ.

To the Honorable MAURICE T. DOOLING, United
States District Judge, in and for the Northern
District of California, First Division:

The petition of Jung Lim respectfully shows:

That Quan Hing Sun, hereinafter in this petition

*Page-number appearing at foot of page of original certified Transcript of Record.

referred to as the "detained," is unlawfully imprisoned, detained, confined and restrained of his liberty by Edward White, Commissioner of Immigration for the port of San Francisco at the Immigration Station at Angel Island, County of Marin, State and Northern District of California; that said imprisonment, detention, confinement and restraint are illegal, and that the illegality thereof consists in this, to wit: That it is claimed by the said Commissioner that the said detained is a Chinese person and an alien not subject or entitled to admission into the United States under the terms and provisions of the Acts of Congress of May 6th, 1882, July 4th, 1884, November 3d, 1893, and the Act of Congress of April 29th, 1902, as amended and re-enacted by Section 5 of the Deficiency Act of April 7th, 1904, which said acts are commonly known and referred to as the Chinese Exclusion or Restriction Acts; and that he, the said Commissioner, intends to deport the said detained Quan Hing Sun away from and out of the United States to the Empire of China. [3]

That the said Commissioner claims that the said detained arrived at the port of San Francisco on or about the 11th day of March, 1916, on the steamship "China," and thereupon made application to enter into the United States as a citizen of the United States by virtue of being the foreign born son of Quan Hay, now deceased, who was a native-born citizen of the United States, and that the application of the said detained to enter the United States as a citizen thereof by virtue of being the foreign-born son of a native-born citizen of the

United States was denied by the said Commissioner of Immigration, and that appeal was thereupon taken from the excluding decision of the said Commissioner of Immigration to the Secretary of the Department of Labor and that the said Secretary thereafter dismissed the said appeal. That it is admitted that the said detained was admissible to the United States under the General Immigration laws thereof. That it is claimed by the said Commissioner that in all of the proceedings had herein the said detained was accorded a full and fair hearing; that the action of the said Commissioner and said Secretary was taken and made by them in the proper exercise of the discretion committed to them by the statutes in such cases made and provided and in accordance with the regulations promulgated under the authority contained in said statutes.

But, on the contrary, your petitioner, on his information and belief alleges that the hearing and proceedings had herein and the action of the said Commissioner and the action of the said Secretary was and is in excess of the authority committed to them by said rules and regulations and by said statutes and [4] that the denial of the application of the said detained, Quan Hing Sun, to enter into the United States, as the foreign-born son of a native-born citizen thereof, was and is an abuse of the authority committed to them by the said statutes in each of the following particulars hereinafter set forth:

FIRST.

Your petitioner alleges that the action of the

said Commissioner in denying the application of the said detained to enter the United States, as shown by the finding of the said Commissioner hereinafter mentioned, was based upon, first, the lack of belief in the existence of the relationship between the said detained and his said father, and second, upon the fact that both of the parents of said detained being dead that in the provisions of Rule 9 promulgated under the authority contained in the statutes hereinbefore referred to, that said detained, though a foreign-born son of a native-born citizen of the United States, was not a citizen of the United States and was not admissible into the United States because of the prior death of his said father, and that upon appeal from the said excluding decision of the said Commissioner to the Secretary of the Department of Labor the said secretary, who had formerly approved the promulgation of the said rule did, upon the authority of an opinion of the Attorney General of the United States just rendered, promptly thereafter decide, in conformity with said decision, that the citizenship status of the detained would not be affected by the prior death of his father; thus eliminating the second ground of denial, and your petitioner further alleges upon his information and belief that in deciding the first point of denial, to wit, the existence of the relationship between the said detained and the said Quan Hay, the said [5] Secretary held and decided that upon the evidence presented upon behalf of the said detained he would be admitted to enter the United States and his appeal sustained if he were

coming to this country to join his father, but because of the prior death of his father and the fact that he was an orphan coming to join his uncle that the said evidence which would have been held sufficient, as aforesaid, was for said reason held to be insufficient to establish the relationship, but in this connection your petitioner alleges that the said action of said Secretary was unlawfully discriminatory and denied to the said detained the equal protection of the laws of the United States and deprived him of his liberty without due process of law, in this, that it substituted for the real issue in the case that of the citizenship of the said detained, the collateral issue in question, as to who is going to care and provide for the said detained in the United States and that because the father of the said detained had previously died and was not therefore in the United States to care and provide for his son that the said evidence which would otherwise have been held sufficient to establish the citizenship of the said detained was for said reason discredited and the said detained denied the legal effect of said testimony and thus your petitioner alleges upon his information and belief that the action of the said Secretary in so denying the application of the said detained to enter the United States was in legal effect to circumvent the conclusions reached in the said opinion of the Attorney General of the United States by denying the said detained the right to enter the United States upon evidence which your petitioner alleges legally and lawfully establishes the fact that said detained was a citizen of the [6]

United States and that the action of the said secretary in so deciding was a manifest abuse of the discretion committed to him by the statutes in such cases made and provided, and resulted in denying the said detained the fair hearing to which he is entitled under the said statutes and said rules.

SECOND.

Your petitioner further alleges upon his information and belief that said detained has been unjustly and illegally discriminated against because, though a citizen of the United States as aforesaid, he is of the Chinese race and, therefore, notwithstanding his citizenship, the said Commissioner of Immigration proceeded to determine and deny the application of the said detained to enter the United States, which said action was contrary to and in violation of the terms and provisions of the Act of Congress of February 20th, 1907, as amended by the Act of Congress of March 25th, 1910, which said acts are commonly known as the General Immigration Laws, and that the said detained, being a citizen of the United States, his citizenship could only, under the said General Immigration Laws of the United States, be determined by a Board of Special Inquiry formed under the terms and provisions of the said Immigration Laws, and the said detained would then and there have an opportunity of presenting his evidence before such a Board of Special Inquiry, and in the event of the denial of his application to enter the United States as a citizen thereof, he would then and there have access to a complete copy of the record and hearings before the said board,

including the decision and findings thereof, so that he might offer evidence to overcome the reasons urged against the recognition of his claim of citizenship, and [7] that he might ask for a rehearing before the said board.

Your petitioner further alleges upon his information and belief that said detained, being a citizen of the United States, the said Commissioner of Immigration acted unlawfully and without statutory authority in proceeding to try and determine the rights of the said detained under the gauge and method provided in the said Chinese Exclusion or Restriction Acts, when the said detained, as such citizen of the United States, was entitled to, under and by virtue of the terms and provisions of the said General Immigration Laws, have his rights determined before a Board of Special Inquiry, consisting of three Immigration Inspectors, which is a right accorded to all persons other than Chinese claiming to be citizens of the United States whose right is denied or questioned by the Immigration Inspector upon original examination when such applicants for admission present themselves for admission into the United States.

THIRD.

Your petitioner further specifies that the evidence submitted upon the application of the said detained to enter the United States was of such a conclusive kind and character and was of such legal weight and sufficiency that it was an abuse of discretion upon the part of said Commissioner and the said secretary not to be guided thereby. And your petitioner al-

leges that the testimony given upon behalf of the said detained touching his right to admission into the United States, which consisted of the testimony of Quan Foo, the uncle of the said detained, and Quan Shew Hay. And your petitioner alleges upon his information and belief that the said testimony was of such a conclusive kind and character that to refuse to be guided thereby and to find in violation thereof was and is an abuse [8] of the discretion committed to the said Commissioner and the said secretary by the statutes in such cases made and provided. And you petitioner further alleges, upon his information and belief, that the adverse action of the said Commissioner and the said secretary was arrived at and was entered after denying to the said detained a fair hearing to the consideration of his case, to which he was entitled. And your petitioner further alleges upon his information and belief that the action of the said Commissioner and the said secretary in thus disregarding the said evidence was done in excess of the discretion committed to them by the Acts of Congress hereinbefore mentioned and was and is in violation of the Constitutional rights of the said detained as a citizen of the United States. And your petitioner further alleges, upon his information and belief, that the testimony of the said witnesses upon behalf of the said detained was discredited solely on the ground of their being members of the Chinese race and because they had not evidenced what the said secretary and the said Commissioner considered was a sufficient amount of American allegiance, without

having accorded or conducted any hearing to determine what American allegiance should consist of, and, further, in unlawfully holding and deciding that native-born citizens of the United States who are of the Chinese race and who maintain a domicile in a foreign land and who do not understand the English language and who do not evince civic interest to a degree satisfactory to the said Commissioner and the said secretary, are not in the same class and category as are all other citizens of the United States, and that for said reasons their said testimony is not to be weighed the same as is the testimony of all other citizens of [9] the United States; and because the said detained's father had died prior to the arrival of the said detained at the port of San Francisco that the said secretary and the said Commissioner thereupon injected into and permitted to influence their determination and decision in the case the element of the dependency of the said detained upon his father as a bar to the right of admission of the said detained into the United States. And your petitioner alleges upon his information and belief that had the same testimony as was presented herein upon behalf of the said detained been presented upon behalf of a person of any race other than a Chinese, that the said evidence would not have been so disregarded and discredited; and your petitioner further alleges therefore that the action of the said secretary and the said Commissioner was influenced against the said detained and his said witnesses solely because of their being of the Chinese race, and in disregard of

the fact that the father of the said detained was conceded to be a citizen of the United States by the said Commissioner and the said secretary.

FOURTH.

And your petitioner further alleges, upon his information and belief, that the action of the said Secretary of the Department of Labor is unlawful in this, that the measure of proof required by the said secretary is that such applicants for admission shall prove their cases beyond doubt, which is a requirement in excess of that laid down by the acts hereinbefore set forth, and that the action of the said secretary in making said requirement is in violation of said acts, and his said action predicated thereon is illegal and void; and, further, that said Rule 9 of the Immigration Rules and Regulations, a copy of which is hereunto annexed and marked exhibit "A," is unconstitutional in this, [10] that it divides citizens of the United States into different classes, giving certain classes greater rights and privileges than it does others; that is to say, giving citizens of fourteen years of age or under certain rights and privileges which it accords in a lesser degree to citizens between the ages of fifteen and eighteen years, and which it accords in a still lesser degree to citizens between the ages of eighteen and twenty-one years, within which latter class comes the detained herein; save that as applied to the said detained the said Rule 9 denies absolutely the right of citizenship to a son of a native-born citizen of the United States if the said son is upwards of twenty-one years of age and denies the right of admission

to a foreign-born son of a native-born citizen of the United States whose father dies prior to the son's claiming the right of admission into the United States—all in violation of the Constitution of the United States and the Revised Statutes thereof, and particularly section 1993 of the said Revised Statutes.

That your petitioner has not in his possession a full copy of the record and testimony taken by the said immigration authorities in the case of the said detained, but your petitioner has in his possession a copy of the Abstract Report of the Examiner in the case of the said detained and a copy of the finding of the said Commissioner; also a copy of the letter from the attorneys in Washington who appeared before the Secretary and handled said appeal there and which is the basis of the information herein set forth; also the original letter of the said Commissioner advising of the rejection of the said appeal, all of which are hereinafter annexed and marked exhibit "B." That your petitioner has not in his possession the remaining portions or parts of the said record, and is unable to obtain the same in [11] time to file with this petition; and that your petitioner is unable to obtain a copy of the finding or decision of the said Secretary of the Department of Labor upon his said appeal, and is so unable, for the reason that there is no copy thereof within the jurisdiction of this court, and for said reason your petitioner cannot file the same with this the said petition.

Your petitioner further alleges that it is the inten-

tion of the said Commissioner to deport the said detained out of and away from the United States, the land of which he is a citizen, and unless this Honorable Court intervene the said detained will be deported from the United States out of the port of San Francisco on the steamship "China," sailing at 1 o'clock P. M. May 24th, 1916, and the said detained will, unless this Court intervene, be deported from the land of which he is a citizen in violation of his rights guaranteed to him by the Constitution of the United States and the laws thereof.

Your petitioner further alleges that this petition is made for and upon behalf of the said detained for the reason that the said detained is a child of too tender years and not sufficient understanding to understand the said petition or verify the same upon his own account and that your petitioner therefore verifies the same upon behalf of the said detained, and upon behalf of the said uncle of the said detained, in whose custody and with whom the said detained has been living since his parole by the immigration authorities to the attorneys for the said detained prior to the denial entered in the case of the said detained by the said Commissioner. That the said uncle of the said detained employed and hired your petitioner to bring the said detained from Los Angeles to San Francisco for the purpose of surrendering him into the custody of the immigration authorities, [12] but that the uncle of the said detained will come to San Francisco at the time of the hearing hereinafter prayed for.

WHEREFORE, your petitioner prays that a writ of habeas corpus may be issued herein directed to the said Commissioner, ordering him to produce the body of the said detained before this Honorable Court at a time and place to be therein specified, together with the time and cause of the detention of the said detained, and for such other relief as to the Court may seem meet and proper in the premises.

JUNG LEM,
Petitioner.

GEO. A. MCGOWAN,
Attorney for Petitioner,
Bank of Italy Building
Clay and Montgomery Streets,
San Francisco, Cal.

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

Jung Lim, being first duly sworn, deposes and says:

That he is the petitioner named in the foregoing petition; that the same has been read and explained to him; that he knows the contents thereof; that the same is true of his own knowledge except as to those matters which are therein stated on his information and belief, and that as to those matters he believes it to be true.

JUNG LEM.

(Chinese Picture.)

[Seal] Photograph of Jung Lim, the Petitioner.

Subscribed and sworn to before me, this 16 day of May, 1916.

[Seal] C. W. CALBREATH,
Deputy Clerk, U. S. District Court, Northern District of California. [13]

**Petitioner's Exhibit "A"—Copy of Rule 9 of the
Immigration Rules and Regulations.**

RULE NINE.

(a) The Supreme Court having held that the lawful wife and children of a Chinese of the exempt classes may be admitted to the United States without presenting the certificate prescribed by Section 6 of the Act of July 5, 1884, and the theory of said judicial exception to the provisions of the Treaty and laws being that the dependent members of the household of a member of the exempt classes may enter without the prescribed certificate because the husband and father is entitled to the company of the wife and the care and custody of the children and because such wife and children having no status of their own, to require them to present the certificate would be to attempt to exact an impossibility, the following conditions are prescribed with respect to the proof that shall be exacted in the cases of such wives and children applying for admission.

(b) In every instance there shall be exacted convincing proof of the relationship asserted as the bases for admission. If the members of the household of the exempt apply in company with the latter, the certificate presented by the husband or father will be accepted as sufficient to cover the members

of his household. If the husband or father is domiciled in the United States, evidence shall be required concerning him of the character specified by section 2 of the Act approved Nov. 3, 1893, to establish the right of a domiciled merchant to readmission after temporary absence from the United States.

(c) In the absence of evidence to the contrary, it shall be assumed that a wife or unmarried daughter is a member of the household of the husband or father.

(d) Male children 14 years of age or under shall be conclusively presumed to be members of the father's household. Male children 15 years of age or over and under 18 years of age shall be presumed to be members of the father's household, but such presumption shall be subject to rebuttal. Such children 18 years of age or over and under 21 years of age shall be required to prove affirmatively and to the satisfaction of the Secretary of Labor that they are members of the father's household.

(e) No Chinese male 21 years of age or over shall be permitted to enter the United States otherwise than as of his own individual status and capacity as a member of the exempt classes and upon exhibition of the certificate prescribed by section six of the Act of July 5, 1884, irrespective of whether he is or is not a member of the household of his exempt father.

(f) The Supreme Court having held that a person of the Chinese race born in the United States is a citizen thereof under the Constitution, and persons of said race not being eligible to become citizens by naturalization, i. e. otherwise than by

birth within the limits of the country, but citizens of this country being entitled to the company of their wives and to the care and custody of their children, upon the same theory described in [14] paragraph (a) hereof, the dependent members of the household of a Chinese American citizen may be admitted to the United States without presenting the certificate required by section six of the act of July 5, 1884, and the following conditions are prescribed with respect to the proof that shall be exacted in such cases.

(g) In every instance there shall be exacted convincing proof of the citizenship of the alleged husband or father and of the relationship to him asserted as the basis for the applicant's claim to admission; and paragraphs (c), (d) and (e) hereof shall be observed in determining whether such applicants are entitled to admission as dependent members of the husband's or father's household.

(h) In the cases described in this rule the exempt status or citizenship of an alleged husband or father who is domiciled within the United States may be investigated and determined prior to the arrival of the wife or child, but no investigation regarding the claimed relationship shall be made until the wife or child arrives at a port of entry. [15]

**Petitioner's Exhibit "B"—Letter Dated May 11,
1916, Edward White to McGowan and Worley.**

U. S. DEPARTMENT OF LABOR.

Immigration Service.

In Answering refer to

No. 15077/5-30.

Office of the Commissioner

Angel Island Station.

San Francisco, Cal., May 11th, 1916.

Messrs. McGowan & Worley,

Bank of Italy Building,

San Francisco, Cal.

Sirs:

In re Quan Hing Sun, alleged son of native, ex. S. S.
China, March 11, 1916:

You are informed that the Department has affirmed the excluding decision of this office, but that it has directed that the child be not deported until he can be placed in the hands of some responsible person who will care for him on the return voyage and see that he is placed in proper custody upon his arrival in China.

Please communicate this information to the interested parties so that arrangements may be made by them for securing the services of a proper guardian.

Respectfully,

(Sgd.) EDWARD WHITE,

Commissioner.

CT/PW. [16]

RALSTON & RICHARDSON,
Attorneys & Counsellors at Law,
Union Savings Bank Bldg.,
Washington, D. C.

May 5, 1916.

Messrs. McGowan & Worley,
Bank of Italy Building,
San Francisco, Cal.

Gentlemen:—

IN RE: QUAM HING SUN.

We beg to confirm our night letter to you of to-day as follows:

“Case Quan Hing Sun recommended for denial holding that boy of 8 years should be able to give better testimony. Medical certificates eliminated. If applicant coming to join father under same circumstances would be admitted but coming to uncle makes Department suspicious. Can we strengthen record?”

The opinion of the Attorney General clears the first point in this case and the nativity of this applicant was not questioned by the Department. The Department also failed to refer to the medical testimony indicating the applicant to be about the age of five years. The Department assumed the applicant to be a boy of eight years, which age was necessary in order to permit of paternity and viewed the testimony as that given by a boy of that age. The memorandum for denial sets forth the discrepancies in the testimony of the applicant and the generally unsatisfactory manner in which the same was given. We, of course, endeavored to attribute this discrep-

ancy and the apparently unsatisfactory manner in which the same was given to the age of the applicant but the Bureau was not inclined to follow us in this theory. Mr. Parker, the chief law officer, in talking with us concerning this case frankly admitted that if the boy were coming to join his [17] own father under the same circumstances he would readily overlook discrepancies and admit the boy because of his extreme youth and because of his inability to labor ever if he so desired. He suggested, however, that the situation in the present case is different in that the boy is coming to join an uncle whose family is in China where presumably the boy could receive better attention in view of his age than he could receive in this country living with the uncle. The theory advanced by the Bureau is, of course, that this applicant is not a son of a native as claimed but is the child of someone else for whom his admission is attempted to be secured. If this boy had come as the adopted son of this uncle we believe we could have secured his admission but in view of his present claim to admission the Department would not consider the adoption of him by his uncle. Because of the extreme youth of this boy the Department in its memorandum has suggested that he be not deported until it can be arranged to return him in the custody of some reliable person that will insure a safe return of the applicant. In view of this disposition on the part of the Department we suggested that justice would be accomplished and the difficulties of this case obviated to allow the admission of this small boy, but Mr.

Parker, to whom matters of this kind are presented, would not agree with us in that. If, as under the old practice, we had had an opportunity to present this matter to Mr. Post we feel that he would have overlooked the technical features of the case and administered justice by admitting this boy. In view of his condition which we have fully explained to you can you *can you* conceive of any plan to strengthen this case and further [18] present the same to the Department? We are very dissatisfied with the outcome, but have presented the matter in every way conceivable to us.

Very truly yours,

(Sgd.) RALSTON & RICHARDSON.

JHR: LKC. [19]

INSPECTOR'S ABSTRACT REPORT.

In re: QUAM HING SUN, No. 15077/5-30
"CHINA" Mar. 11,

Name: Quam Hing Sun, no other. Affiant was born on April 17th, 1908 (8 years old American Reckoning). Age 9, Chinese.

Destination: Los Angeles.

Father: Quan Hay, Quan Lung Hay, dead.

Is Father's American nativity established? Yes, by landing No. 49 "Mongolia," June 20, 1908.

Is essential trip verified? Yes.

Children: 1 son, no girl.

When did father enter the United States? Claims nativity.

How many trips has he made to China? One.

When did he return from last trip? 1908.

Did he mention the applicant at the time on any trip? Yes.

Is there prior landed brother? No.

Where is the mother? A. Dead.

How many wives has the father? One.

Is there resemblance between the alleged father and the applicant? Nothing special.

Supporting witnesses? Uncle Quan Foo and Quan Shew Hay.

When was he last in China? Uncle came back with the applicant. Quan Shew Hay came here in 1913.

What was the demeanor of the witnesses? OK except applicant, whose manner of testifying was very unsatisfactory.

Does the testimony disclose any discrepancies on essential points? Yes.

Do you believe the relationship exists? No.

Is your adverse opinion based on discrepancies? Yes.

Would your opinion be otherwise if you disregarded the discrepancies?

BECKTELL,
March 30th, 1916.

Finding.

After a full hearing and careful consideration of all the evidence submitted and adduced in the matter of the application of Quan Hing Sun for admission to the United States as the minor son of a native, the existence of the relationship claimed to his alleged father is not established to my satisfaction, and it further appears that both the parents of the

applicant are dead, and therefore he is inadmissible under the provisions of Rule 9. The application to land is accordingly denied, and the applicant advised of his right to appeal.

EDWARD WHITE.

March 30th, 1916.

[Endorsed]: Filed May 16, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [20]

In the District Court of the United States, in and for the Northern District of California, Division Number One.

No. 16,028.

In the Matter of QUAN HING SUN, on Habeas Corpus.

Order to Show Cause.

Good cause appearing therefor, and upon reading the verified petition on file herein, it is hereby ordered that Edward White, Commissioner of Immigration for the port and District of San Francisco, appear before this Court on the 3 day of June, 1916, at the hour of 10 o'clock A. M. of the said day, to show cause, if any he has, why a writ of habeas corpus should not be issued herein as prayed for, and that a copy of this order, with said petition, be served upon the said Commissioner.

AND IT IS FURTHER ORDERED that the said Edward White, Commissioner of Immigration aforesaid, or whoever, acting under the orders of the

said Commissioner or the Secretary of Labor, shall have the custody of the said Quan Hing Sun, are hereby ordered and directed to retain the said Quan Hing Sun within the custody of the said Commissioner of Immigration and within the jurisdiction of this Honorable Court until its further order herein.

Dated, San Francisco, California, May 16, 1916.

M. T. DOOLING,
United States District Judge.

[Endorsed]: Filed May 16, 1916. W. B. Maling,
Clerk. By T. L. Baldwin, Deputy Clerk. [21]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

No. 16,028.

In the Matter of QUAN HING SUN, on Habeas
Corpus.

Return.

Now comes Edward White, Commissioner of Immigration at the port of San Francisco, by Charles D. Mayer, Immigrant Inspector, and in return to the order to show cause, issued by the said Court on the petition of Jung Lim, in behalf of Quan Hing Sun, for a writ of habeas corpus, and to said petition, admits, denies and alleges as follows: DENIES that Quan Hing Sun, also known as the detained, is unlawfully imprisoned, detained, confined and restrained, or unlawfully imprisoned, or

detained, or confined, or restrained of his liberty by said Edward White, Commissioner of Immigration, for the port of San Francisco, at the Immigration Station at Angel Island, or elsewhere, or at all.

As to the following allegation on page 2 of said petition, namely: that it is admitted that the said detained was admissible to the United States under the General Immigration Laws thereof, respondent has no information or belief concerning said allegation sufficient to enable him to answer the same, and basing his answer upon said lack of information, denies that it is admitted that the said detained was admissible to the United States under the General Immigration Laws thereof, and in this connection respondent alleges that the admissibility of the said detained has never been passed upon by the Board of Special Inquiry, provided for by the said Immigration Laws, and that the said alien. [22] is still subject to an investigation by the said board.

DENIES that in deciding the question of the existence of the relationship between the said detained and the said Quan Hay, the said Secretary held and decided, or held or decided that upon the evidence presented upon behalf of the said detained, the said detained would be admitted to enter the United States and his appeal sustained if he were coming to this country to join his father, and in this connection respondent alleges that the said Secretary has never at any time taken the position that if the boy were coming to join his father in this country, and not his uncle, that he would have been permitted to enter the United States, and in this

connection, and in reply to the letter attached to the petition in the above-entitled matter, marked exhibit "A," directed to McGowan & Worley, and signed "Ralston & Richardson," respondent attaches hereto, incorporates into, and makes a part hereof, an original letter marked exhibit "A," directed to the Commissioner of Immigration, San Francisco, California, and signed Alfred Hampton, Assistant Commissioner General.

DENIES that because of the prior death of the said detained's father, and the fact that he was an orphan coming to join his uncle, or of either of said facts, that the said evidence presented by the said detained was held to be insufficient to establish the relationship.

DENIES that the said action of the said Secretary was unlawfully discriminatory or at all discriminatory and denied to the said detained equal protection, or any protection of the laws of the United States and deprived him of his liberty without due process of law.

DENIES that the said Secretary substituted for the real issue in the case, namely: that of the citizenship of the said detained, the collateral issue, or any other issue. [23]

DENIES that the action of the said Secretary in so denying the application of the said detained to enter the United States was in legal effect, or otherwise, to circumvent the conclusions reached in the said opinion or any opinion of the Attorney General of the United States, by denying said detained to enter the United States, or otherwise, or at all.

DENIES that the action of the said Secretary resulted in denying the said detained the fair hearing to which he is entitled under the laws of the United States.

DENIES that the detained has been unjustly and illegally, or unjustly, or illegally, discriminated against because he is of the Chinese race, or for any other reason, or at all.

DENIES that the action of the said Commissioner of Immigration was contrary to and in violation of the terms and provisions of the Acts of Congress of February 20, 1907, as amended by the Act of Congress of March 26, 1910.

DENIES that the citizenship of said detained could be determined only under the General Immigration Laws and by a Board of Special Inquiry confirmed under the terms and provisions of the said Immigration Laws.

DENIES that the said detained is a citizen of the United States; DENIES that the said Commissioner of Immigration acted unlawfully and without statutory authority, or unlawfully, or without statutory authority in proceeding to try and determine, or try, or determine, the rights of the said detained under the gauge and method, or under the gauge or method provided in the said Chinese Exclusion or Restriction Acts.

Alleges that the said Commissioner and Secretary were guided by the evidence submitted upon the application of the said detained to enter the United States in determining that the said detained [24]

should be denied admission into the United States and deported therefrom.

DENIES that the adverse action of the said Commissioner and the said Secretary, or the said Commissioner, or the said Secretary, was arrived at and was entered after denying to the said detained a fair hearing to the consideration of his case.

DENIES that any of the acts committed or done on the part of the said Commissioner, or the said Secretary, were in violation of the constitutional rights of the said detained, and in this connection respondent alleges that the said detained was given a full, fair and complete hearing before the Immigration officials, and that a proper consideration was given to all of the evidence adduced.

DENIES that the testimony of the witnesses on behalf of the said detained was discredited solely on the ground of their being members of the Chinese race and because they had not evidenced what the said Secretary and the said Commissioner considered was a sufficient amount of American allegiance, or because they were members of the Chinese race, or had not evidenced what the said Secretary and the said Commissioner, or the said Secretary, or the said Commissioner considered was a sufficient amount of American allegiance.

DENIES that the said Commissioner or the said Secretary ever discriminated between native born citizens or any citizens of the United States, because they are of the Chinese race, or for any other reason, or at all.

DENIES that had the same testimony as was pre-

sented herein, upon behalf of the said detained, been presented on behalf of a person of any race other than the Chinese, that the said evidence would not have been so discredited and disregarded, or discredited, or disregarded, and in this connection respondent alleges that had the said detained been a member of any race other than the Chinese, [25] and presented the same testimony as was presented in this case, the action of the said Secretary and the said Commissioner of Immigration would have been the same.

DENIES that the action of the said Secretary and the said Commissioner of Immigration, or the said Secretary, or the said Commissioner of Immigration, was influenced against the said detained and his witnesses, or the said detained, or his witnesses, solely because of their being of the Chinese race, or for any other reason or at all.

As a further separate and distinct answer and defense to the petition on file herein, respondent alleges that since the application of the said detained to enter the United States through the port of San Francisco, certain hearings have been conducted in behalf of the said detained, and testimony and other evidence has been taken concerning the right of the said detained to enter into and remain in the United States; that the said hearings were conducted and the testimony and other evidence taken by the immigration officials acting for and on behalf of the Government of the United States, and that all of the evidence and other testimony given or taken at said hearings have been recorded by the said immigra-

tion officials in a record known as the original record in the case of Quan Hing Sun, of the Bureau of Immigration; that said testimony and other evidence and all of the exhibits that were considered with the said record are by reference incorporated into and made a part of this answer and the same are filed herewith.

WHEREFORE, respondent prays that said petition for a writ of habeas corpus be denied and that the said alien be remanded to the custody of the respondent for deportation as provided for in said warrant of deportation heretofore issued by the Secretary of [26] Labor of the United States, and for such other and further relief as to this Court seems equitable and just.

JNO. W. PRESTON,

United States Attorney.

CASPER A. ORNBAUN,

Asst. United States Attorney.

United States of America,

Northern District of California,

City and County of San Francisco,—ss.

Charles D. Mayer, being first duly sworn, deposes and says: That he is a Chinese and Immigrant Inspector connected with the Immigration Service for the port of San Francisco, and has been specially directed to appear for and represent the respondent, Edward White, Commissioner of Immigration, in the within entitled matter; that he is familiar with all the facts set forth in the within return to petition for writ of habeas corpus and knows the contents thereof; that it is impossible for the said

Edward White to appear in person or to give his attention to said matter; that of affiant's own knowledge the matters set forth in the return to petition for writ of habeas corpus are true, excepting those matters which are stated on information and belief, and that as to those matters, he believes it to be true.

CHARLES D. MAYER.

Subscribed and sworn to before me this 1 day of July, 1916.

[Seal]

C. W. CALBREATH,
Deputy Clerk U. S. District Court, Northern District of California. [27]

Copy recd. July 1, '16.

G. A. McGOWAN,
Atty. for Petitioner.

[Endorsed]: Presented in open court and filed July 1, 1916. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [28]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Saturday, the 30th day of September, in the year of our Lord, one thousand nine hundred and sixteen. Present: MAURICE T. DOOLING, District Judge.

No. 16,028.

In the Matter of QUAN HING SUN, on Habeas Corpus.

(Minutes—Re Immigration Record.)

This matter came on regularly this day for hearing of the return to the order to show cause herein. Geo. A. McGowan, Esq., appeared as attorney for and on behalf of petitioner and detained. C. A. Ornbaun, Esq., Assistant United States Attorney, was present on behalf of respondent and presented the Immigration Records as to detained, which the Court ordered filed as Respondent's Exhibits "A" and "B," and that the same be considered as a part of the original petition herein. Thereupon said matter was submitted on the records filed herein.

[29]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,028.

In the Matter of QUAN HING SUN, on Habeas Corpus.

(Order Discharging Writ of Habeas Corpus and Remanding Petitioner for Deportation.)

GEORGE A. MCGOWAN, Esq., Attorney for Petitioner.

JOHN W. PRESTON, Esq., United States Attorney and CASPER A. ORNBAUN, Esq., Assistant United States Attorney, Attorneys for Respondent.

ON RETURN TO WRIT OF HABEAS CORPUS.

It appears from the return herein, and the records of the Department introduced in support of it that the petitioner, now held for deportation, was excluded because the Department was not satisfied that petitioner was really the son of Quan Hay, an American citizen as claimed. The hearing accorded seems to have been fair, and the findings of the Department under such circumstances are not open to review in this proceeding.

The writ will therefore be discharged, and the petitioner remanded for deportation.

October 27th, 1916.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Oct. 27, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [30]

*In the District Court of the United States, in and
for the Northern District of California, South-
ern Division, First Division.*

No. 16,028.

In the Matter of the Application of QUAN HING
SUN, on Habeas Corpus.

Notice of Appeal.

To the Clerk of the above-entitled Court, and to the
Hon. JOHN W. PRESTON, United States
Attorney for the Northern District of Cali-
fornia:

YOU and each of you will please take notice that Quan Hing Sun, the detained herein, by Jung Lim, the petitioner herein, do hereby appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit from the order made and entered herein on the 27th day of October, 1916, dismissing the writ of habeas corpus and denying the petition herein.

Dated: San Francisco, California, Jan. 16th, 1917.

GEO. A. McGOWAN,

Attorney for Petitioner, Detained and Appellants,
Herein.

Due service and receipt of a copy of the within notice of appeal is hereby admitted this 16th day of January, 1917.

JNO. W. PRESTON,

U. S. Attorney, Northern District of California,
Attorney for Respondent.

[Endorsed]: Filed Jan. 16, 1917. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [31]

*In the District Court of the United States, in and for
the Northern District of California, Southern
Division, First Division.*

No. 16,028.

In the Matter of the Application of QUAN HING
SUN, on Habeas Corpus.

Petition for Appeal.

COMES now Quan Hing Sun, the detained, by Jung Lim, the petitioner, who are the appellants herein, and say:

That on the 27th day of October, 1916, the above-entitled Court made and entered its order denying the petition for a writ of habeas corpus as prayed for and filed herein, in which said order certain errors are made to the prejudice of the appellants herein, all of which will more fully appear from the assignment of errors filed herein.

WHEREFORE these appellants pray that an appeal may be granted in their behalf to the Circuit Court of the United States for the Ninth Judicial Circuit for a correction of the errors so complained of, and further that a transcript of the record, proceedings and papers in the above-entitled cause as shown by the said United States Circuit Court of Appeals for the Ninth Circuit. It is further prayed that during the pendency of the said appeal that the said Quan Hing Sun may retain his liberty and remain at large under the order heretofore made herein, provided that he remains within the State of California and renders himself in execution of whatever judgment is finally entered herein.

Dated: San Francisco, California, January 16th, 1917.

G. A. McGOWAN,
Attorney for Petitioners, Detained and Appellants
Herein. [32]

Due service and receipt of a copy of the within petition for appeal is hereby admitted this 16 day of January, 1917.

JNO. W. PRESTON,
U. S. Attorney, Northern District of California,
Attorney for Respondent.

[Endorsed]: Filed Jan. 16, 1917. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [33]

*In the District Court of the United States, in and for
the Northern District of California, Southern
Division, Division No. 1.*

No. 16,028.

In the Matter of the Application of QUAN HING
SUN, on Habeas Corpus.

Order Allowing Petition for Appeal.

On this 16th day of January, 1917, comes Quan Hing Sun, the detained herein, by Jung Lim, the petitioner herein, both of whom are appellants herein, by their attorney, George A. McGowan, Esquire, and having previously filed herein, did present to this Court their petition praying for the allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, intended to be urged and prosecuted by them, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judi-

cial Circuit, and that such other and further proceedings may be had in the premises as may seem proper.

IN CONSIDERATION WHEREOF this Honorable Court does hereby allow the appeal herein prayed for, and orders and directs that the order of remand heretofore made and entered herein, and the order of deportation made by the Commissioner of Immigration of the port of San Francisco, State of California, and so affirmed by the Secretary of Labor, be stayed pending a hearing of the said case in the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and it is further ordered that the said Quan Hing Sun may retain his liberty and remain at large under the order heretofore made herein, provided that he remain within the State of California [34] and render himself in execution of whatever judgment is finally entered herein.

Dated: San Francisco, California, January 16th, 1917.

M. T. DOOLING,
United States District Judge.

Due service and receipt of a copy of the within order allowing appeal is hereby admitted this 16 day of January, 1917.

JNO. W. PRESTON,
U. S. Attorney, Northern District of California,
Attorney for Respondent.

[Endorsed]: Filed Jan. 16, 1917. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [35]

*In the District Court of the United States, in and for
the Northern District of California, Southern
Division, First Division.*

No. 16,028.

In the Matter of the Application of QUAN HING
SUN, on Habeas Corpus.

Assignment of Errors.

COMES now Quan Hing Sun, the detained herein, by Jung Lim, the petitioner herein, both of whom are appellants herein, by their attorney, George A. McGowan, Esquire, in connection with their petition for a hearing herein, assign the following errors which they aver occurred upon the trial or hearing of the above-entitled cause, and upon which they will rely, upon appeal to the Circuit Court of Appeals for the Ninth Judicial Circuit, to wit:

FIRST. That the Court erred in denying the petition for a writ of habeas corpus herein.

SECOND. That the Court erred in not holding that it had jurisdiction to issue a writ of habeas corpus, as prayed for in the petition herein.

THIRD. That the Court erred in not holding that the allegations contained in the petition herein for a writ of habeas corpus were sufficient in law to justify the granting and issuing of a writ of habeas corpus, as prayed for in the said petition.

FOURTH. That the Court erred in holding that the immigration authorities had accorded the appellant, Quan Hing Sun, a fair hearing in the matter of his application to enter the United States.

WHEREFORE, the appellants pray that the judgment and order of the United States District Court, in and for the Northern District of the State of California, made and entered herein in the [36] office of the clerk of said Court on the 27th day of October, 1916, discharging the order to show cause and dismissing the petition for a writ of habeas corpus be reversed, and that this cause be remitted to the said lower Court with instruction to discharge the said Quan Hing Sun from custody, or grant him a new trial before the lower Court, by directing the issuance of a writ of habeas corpus, as prayed for in the said petition.

Dated: San Francisco, California, January 16th, 1917.

GEO. A. McGOWAN,
Attorney for Appellants.

Due service and receipt of a copy of the within assignment of errors is hereby admitted this 16th day of January, 1917.

JNO. W. PRESTON,
U. S. Attorney, Northern District of California,
Attorney for Respondent,

[Endorsed]: Filed Jan. 16, 1917. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [37]

(Citation on Appeal—Copy.)

UNITED STATES OF AMERICA.—ss.

The President of the United States, to the Honorable EDWARD WHITE, Commissioner of Immigration of the Port of San Francisco, and JOHN W. PRESTON, Esquire, the United States Attorney for the Northern District of California, His Attorney Herein, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Northern District of California, Southern Division thereof, 1st Division, wherein Quan Hing Sun, the detained herein, and Jung Lim, the petitioner herein, are appellants, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable M. T. DOOLING, United States District Judge for the Northern District of California, on this 16th day of January, A. D. 1917.

M. T. DOOLING,
United States District Judge.

Service of the within citation and receipt of a copy thereof is hereby admitted this 16th day of January, 1917.

JNO. W. PRESTON,
U. S. Attorney.

[Endorsed]: Filed Jan. 16, 1917. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [38]

*District Court of the United States, in and for
the Northern District of California, Southern
Division, First Division.*

No. 16,028.

In the Matter of the Application of QUAN HING
SUN, on Habeas Corpus.

**Stipulation and Order Respecting Withdrawal of
Immigration Record.**

IT IS HEREBY STIPULATED and agreed by and between the attorney for the petitioner and appellants herein, and the attorney for the respondent and appellee herein, that the original Immigration record in evidence and considered as part and parcel of the petition for a writ of habeas corpus upon hearing of the demurrer in the above-entitled matter, may be withdrawn from the files of the clerk of the above-entitled Court and filed with the clerk of the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, there to be considered as part and parcel of the record on appeal, in the above-entitled case with the same force and effect

as if embodied in the transcript of the record and so certified to by the clerk of this Court.

Dated: San Francisco, California, January 17, 1917.

GEO. A. MCGOWAN,
Attorney for Petitioner and Appellant.

JNO. W. PRESTON,
United States Attorney for the Northern District of
California,
Attorney for Respondent and Appellee. [39]

Order.

Upon reading and filing the foregoing stipulation, it is hereby ordered that the said Immigration record therein referred to, may be withdrawn from the office of the clerk of this Court and filed in the office of the clerk of the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, said withdrawal to be made at the time the record on appeal herein is certified to by the clerk of this Court.

M. T. DOOLING,
United States District Judge.

Dated: San Francisco, California, January 18th, 1917.

Due service and receipt of a copy of the within stipulation and order is hereby admitted this 17th day of January, 1917.

JNO. W. PRESTON,
U. S. Attorney, Northern District of California,
Attorney for Respondent.

[Endorsed]: Filed Jan. 18, 1917. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [40]

*District Court of the United States, in and for the
Northern District of California, Southern Division,
First Division.*

No. 16,028.

In the Matter of the Application of QUAN HING
SUN, on Habeas Corpus.

**Stipulation and Order Extending Time to Docket
Case.**

Good cause appearing therefor, and upon motion
of George A. McGowan, Esquire, attorney for the
petitioner and appellants herein,—

IT IS HEREBY ORDERED that the time within
which the above-entitled case may be docketed in the
office of the clerk of the United States District Court
of Appeals for the First District, may be and the
same hereby is extended for the period of thirty (30)
days from and after the date hereof.

Dated San Francisco, California, February 15th,
1917.

M. T. DOOLING,
United States District Judge.

The making of the foregoing order is hereby stipu-
lated and agreed to by and between the counsel for
the respective parties hereto.

JNO. W. PRESTON,
United States Attorney for the Northern District
of California,

Attorney for Respondent and Appellee.

GEO. A. MCGOWAN,
Attorney for Petitioner and Appellant.

[Endorsed]: Filed Feb. 15, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [41]

District Court of the United States, in and for the Northern District of California, Southern Division.

No. 16,028.

In the Matter of the Application of QUAN HING SUN, on Habeas Corpus.

Stipulation and Order Extending Time to Docket Case.

Good cause appearing therefor, and upon motion of George A. McGowan, Esquire, attorney for the petitioner and appellants herein,

IT IS HEREBY ORDERED that the time within which the above-entitled case may be docketed in the office of the clerk of the United States *District* Court of Appeals for the *First* District, may be and the same hereby is extended for the period of thirty (30) days from and after the date hereof.

Dated San Francisco, California, March 17th, 1917.

WM. W. MORROW,

Judge United States *Circuit* of Appeals.

The making of the foregoing order is hereby stipulated and agreed to by and between the counsel for

the respective parties hereto.

JNO. W. PRESTON,

United States Attorney for the Northern District of
California,

Attorney for Respondent.

GEO. A. McGOWAN,

Attorney for Petitioner and Appellant.

[Endorsed]: Filed Mar. 17, 1917. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [42]

*District Court of the United States, in and for the
Northern District of California, Southern Divi-
sion.*

No. 16,028.

In the Matter of the Application of QUAN HING
SUN, on Habeas Corpus.

**Stipulation and Order Extending Time to Docket
Case.**

Good cause appearing therefor, and upon motion
of George A. McGowan, Esquire, attorney for the
petitioner and appellants herein,

IT IS HEREBY ORDERED that the time within
which the above-entitled case may be docketed in the
office of the clerk of the United States *District* Court
of Appeals for the *First* District, may be and the
same hereby is extended for the period of thirty (30)
days from and after the date hereof.

Dated San Francisco, California, April 14th, 1917.

M. T. DOOLING,

United States District Judge.

The making of the foregoing order is hereby stipulated and agreed to by and between the counsel for the respective parties hereto.

JNO. W. PRESTON,
United States Attorney for the Northern District of
California,

Attorney for Respondent.

GEO. A. McGOWAN,
Attorney for Petitioner and Appellant.

[Endorsed]: Filed Apr. 14, 1917. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [43]

*District Court of the United States, in and for the
Northern District of California, Southern Division.*

No. 16,028.

In the Matter of the Application of QUAN HING
SUN, on Habeas Corpus.

**Stipulation and Order Extending Time to Docket
Case.**

Good cause appearing therefor, and upon motion of George A. McGowan, Esquire, attorney for the petitioner and appellants herein,

IT IS HEREBY ORDERED that the time within which the above-entitled case may be docketed in the office of the clerk of the United States District Court of Appeals for the First District, may be and the same hereby is extended for the period of twenty (20) days from and after the date hereof.

Dated, San Francisco, California, May 12th, 1917.

M. T. DOOLING,

United States District Judge.

The making of the foregoing order is hereby stipulated and agreed to by and between the counsel for the respective parties hereto.

JNO. W. PRESTON,

United States Attorney for the Northern District of California,

Attorney for Respondent.

GEO. A. McGOWAN,

Attorney for Petitioner and Appellant.

[Endorsed]: Filed May 12, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [44]

Certificate of Clerk U. S. District Court to Transcript on Appeal.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 44 pages, numbered from 1 to 44, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the matter of Quan Hing Sun, on habeas corpus, No. 16,028, as the same now remain on file and of record in the office of the clerk of said District Court; said transcript having been prepared pursuant to and in accordance with "Amended Praeceptum for Transcript on Appeal" (copy of which is embodied in this transcript), and the instructions of the attorney for the petitioner and appellant herein.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of Twenty-one Dollars and Seventy Cents (\$21.70), and that the same has been paid to me by the attorney for the appellant herein.

Annexed hereto is the original Citation on Appeal, issued herein (page 46).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 25th day of May, A. D. 1917.

[Seal]

WALTER B. MALING,

Clerk.

By C. W. Calbreath,

Deputy Clerk.

CMT. [45]

(Citation on Appeal—Original.)

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the Honorable EDWARD WHITE, Commissioner of Immigration of the port of San Francisco, and JOHN W. PRESTON, Esquire, the United States Attorney for the Northern District of California, His Attorney Herein, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Northern

District of California, Southern Division thereof, 1st Division wherein Quan Hing Sun, the detained herein, and Jung Lim, the petitioner herein, are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable M. T. DOOLING, United States District Judge for the Northern District of California, on this 16th day of January, A. D. 1917.

M. T. DOOLING,
United States District Judge. [46]

Service of the within citation and receipt of a copy thereof is hereby admitted this 16th day of January, 1917.

JNO. W. PRESTON,
U. S. Attorney.

[Endorsed]: No. 16,028. United States District Court for the Northern District of California, Southern Division, 1st Division. Quan Hing Sun, and Jung Lim, Appellants, vs. Edward White, Commissioner of Immigration, and John W. Preston, U. S. Attorney. Citation on Appeal. Filed Jan. 16, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

[Endorsed]: No. 3039. United States Circuit Court of Appeals for the Ninth Circuit. Quan Hing Sun and Jung Lim, Appellants, vs. Edward White, Commissioner of Immigration of the Port of San Francisco, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed August 25, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 3039

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

QUAN HING SUN and JUNG LIM,

Appellants,

vs.

EDWARD WHITE,

Commissioner of Immigration of the
Port of San Francisco,

Appellee.

OPENING BRIEF FOR APPELLANTS

Upon Appeal From the Southern Division of the
United States District Court for the
Northern District of California.
First Division.

GEORGE A. MCGOWAN,

Attorney for Appellant.

Bank of Italy Building,
550 Montgomery Street,
San Francisco, Cal.

Filed this.....day of June, 1918.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

No. 3039

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

QUAN HING SUN and JUNG LIM,

Appellants,

VS.

EDWARD WHITE,

Commissioner of Immigration of the
Port of San Francisco,

Appellee.

OPENING BRIEF FOR APPELLANTS

STATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the Northern District of California, Southern Division, First Division thereof, denying the petition for a writ of habeas corpus, and ordering the remand of the detained, Quan Hing Sun, the appellant herein. This appellant, Quan Hing Sun, applied to enter the United States as a citizen thereof, he claiming to be the foreign born son of a native-born citizen of the United States. His claim was based under Section 1993 of the Revised Statutes, which is as follows:

"All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

Shortly prior to the arrival of this applicant at the port of San Francisco, the Commissioner General of Immigration, with the approval of the Secretary of Labor, had issued and promulgated Rule 9 of the Immigration Rules and Regulations, which is set forth in Tr. 15-17. The object and purpose of this Rule 9 was to place into operation the construction which the said officials of the Department of Labor placed upon the said section 1993. Their contention was that the citizenship provided for in section 1993 was not the direct citizenship of the foreign born child, but on the contrary, that it was a sort of naturalization or a communicated status, and that the applicant for whom the benefits of citizenship were intended, must be a dependent member of his father's household; he must still be a minor; and must prove his case by evidence arbitrarily graded in the degree of its sufficiency with respect to the age of the applicant; if the native-born father died prior to the application of his foreign-born son to enter the United States, he could not enter because there was then no citizenship left to be communicated to his son applying to enter the land of his deceased father's nativity. It was further contended by them that this status of citizenship could not be so communicated after the foreign born son had attained

his majority, and in the case where the son was still a minor it could only be communicated where the son was a dependent member of his father's household. This Rule 9, with the contentions which prompted the same, was the subject of various decisions by the lower Court herein, contemporaneous with the application of this appellant to enter the United States, which will be hereafter set forth:

Quan Hing Sun arrived at the port of San Francisco on the steamship "China" the 11th of March, 1916, and made application to enter the United States as a citizen thereof by virtue of being the foreign born son of Quan Hay, now deceased, who was a native-born citizen of the United States. [Tr. 3.] The Commissioner of Immigration under Rule 3 of the Regulations governing the admission of Chinese persons to the United States, caused the appellant to be first examined under the General Immigration Law, where he was found admissible, and then caused him to be examined under the Chinese Exclusion or Restriction Acts, where his application to enter the United States was denied. Upon appeal to the Secretary of Labor, this excluding decision was affirmed. The testimony presented before the Commissioner conclusively established, and indeed it was admitted, that the said Quan Hay, now deceased, was a native-born citizen of the United States of America. It was also established and conceded that Quan Foo, Quan Hay's brother, and the uncle of this applicant, Quan Hing Sun, and who brought Quan Hing Sun to this country from China with him, was also a native-born citizen of the United

States of America, and he was admitted by the Commissioner of Immigration as such citizen of the United States. The evidence presented upon behalf of Quan Hing Sun consisted of his own testimony, the testimony of his uncle, Quan Foo, and an identifying witness, Quan Shew Hay. It is claimed that the evidence presented was of such a conclusive kind and character, that to disregard the same was an abuse of discretion upon the part of the immigration officials. It is further claimed that by reason of Rule 9, hereinbefore mentioned, they weighed and construed the testimony in an arbitrary manner, and viewed the application of this appellant to enter the United States with hostility, and deprived the appellant of the fair hearing of his application to enter the United States to which he was entitled to. In considering the testimony of Quan Hing Sun, the appellant, it must be borne in mind that he was, at the time he was examined, a child eight years of age, and it is the contention of the appellant that the immigration authorities abused their discretion in fixing an arbitrary standard by which the testimony of this little child should be weighed. In other words, maintaining that because his native-born citizen father was dead, that they would require this appellant to meet a higher standard because he was with and to remain and live with his uncle than they would have required had he come to live with his father, thus in substance and effect carrying out the intention expressed in said Rule 9.

ARGUMENT

There are two points involved in this case. First, whether a citizen of this country of Chinese extraction coming here from abroad is not entitled, as a matter of right, to have his citizenship determined in the same way and under the same law by which all other citizens of this country have their citizenship determined? Second, whether there was an abuse of discretion on the part of the immigration officials in disregarding the evidence of citizenship presented by and on behalf of Quan Hing Sun.

First—It is maintained that all citizens of this country, without distinction, returning from abroad, are entitled to have their citizenship determined in exactly the same way. Rule 3 of the Regulations governing the admission of Chinese persons to the United States provides that Chinese shall be examined first, as to the right of admission under the laws regulating Immigration. *Ex parte Wong Tuey Hing*, 213 Fed. 112 [Page 114] General Immigration Act of 1907, 34 Stat. 898, in sections 24 and 25 thereof, it is provided in part as follows:

“Sec. 24. . . . Immigration officers shall have power to administer oaths and to take and consider evidence touching the right of any alien to enter the United States, and, where such action may be necessary, to make a written record of such evidence. . . . The decision of any such officer, if favorable to the admission of any alien, shall be subject to challenge by any other immigration officer, and such challenge shall operate to take the alien whose right to land is so challenged before a board of special inquiry for its investiga-

tion. Every alien who may not appear to the examining immigrant inspector at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry.

"Sec. 25. That such boards of special inquiry shall be appointed by the commissioner of immigration at the various ports of arrival as may be necessary for the prompt determination of all cases of immigrants detained at such ports under the provisions of law. Each board shall consist of three members, who shall be selected from such of the immigrant officials in the service as the Commissioner General of Immigration with the approval of the Secretary of Labor, shall from time to time designate as qualified to serve on such boards:"

In the present case instead of appointing a Board of Special Inquiry, the Commissioner of Immigration proceeded to determine the citizenship of Quan Hing Sun under the method and gauge provided by the Chinese Exclusion Laws, which provide for an entirely different procedure. Under the General Immigration Law, the Commissioner of Immigration is purely an executive officer, the *quasi* judicial function of determining the case being vested in the immigration inspectors, first singly and then grouped in a Board of Special Inquiry. Under the Chinese Exclusion Laws the individual inspector examines and reports upon the case much as a referee would, and the commissioner of immigration then exercises the *quasi* judicial function of determining the case. In each instance a right of appeal exists from an adverse conclusion to the Secretary of the Department of Labor. The immi-

gration procedure allows a complete inspection of the entire record including the findings and reasonings of the Board of Special Inquiry. The procedure under the Chinese Exclusion Laws withholds this matter from the applicant for admission, only advising him of the final result. It is maintained that there cannot be two separate ways of determining American citizenship with due regard to the equal rights of all citizens before the law. In *U. S. vs. Sing Tuck*, 194 U. S. 161, it is held that:

“Considerations similar to those which we have suggested lead to a further conclusion. Whatever may be the ultimate rights of a person seeking to enter the country, and alleging that he is a citizen, it is within the power of Congress to provide at least, for a preliminary investigation by an inspector, and for a detention of the person until he has established his citizenship in some reasonable way. If the person satisfies the inspector he is allowed to enter the country without further trial.”

The *Sing Tuck* decision is the forerunner of the *Jew Toy* case [198 U. S. 253], which in turn was followed by the *Chin Yow* case [208 U. S. 8]. In all of these cases it is noteworthy to observe that the point here urged is not discussed. In the *Sing Tuck* case, however, it is rather assumed that citizenship is determined by immigration inspectors.

The prejudicial result of trying the *Quan Hing Sun* case under the Chinese Exclusion Laws is at once apparent. Immigration Inspector Beckett, who tried the case of *Quan Hing Sun*, would, under the procedure set forth in the General Immigration Law,

simply have held him to answer before a Board of Special Inquiry and he would not have been thereafter qualified to sit upon the Board and hear and determine Quan Hing Sun's right to enter the United States. In the case of *United States vs. Redfern*, 180 Fed. 500, at pages 501 and 502, it is held as follows:

"It is fundamental in American jurisprudence that every person is entitled to a fair trial by an impartial tribunal, and a board of special inquiry constituted as in this case is at least open to suspicion. I do not believe that the law contemplates that the inspector who makes the preliminary examination shall serve on the board of special inquiry, and I must hold in this case that the board which denied to petitioner the right to land was illegal and without power."

In the present case it is at once seen that the vice of the procedure followed far exceeds that which was found to constitute unfairness in *United States vs. Redfern, supra*. In the case just cited, the inspector was held to be disqualified from even sitting upon or participating in the deliberations of the Special Board of Inquiry which would have consisted of two officers besides himself, so at least there would have been a chance of the two other immigrant inspectors not following his adverse opinion, whereas in the present case the inspector who was to have held Quan Hing Sun to answer before a Board of Special Inquiry would have thus exhausted his legal capacity to further act in the case, had the hearing been held under the General Immigration Law, but what actually was done was that this same inspector, notwithstanding the dis-

qualification for which we have contended he, in effect in his future conduct in the case, usurped the functions that should have been discharged by an entire Board of Special Inquiry, because was alone the examining inspector who came in contact with the witnesses and observed their manner of testifying and their conduct and demeanor while under examination, and he, to all intents and purposes, decided the case adversely, for while the Commissioner in law actually decides the case, he does so without coming personally in contact with the principals, and acts upon the recommendation of his subordinate officers. It is therefore submitted that the class of procedure under which Quan Hing Sun's case was tried was vastly prejudicial to his rights when we consider what the procedure would have been had his case been examined and the issue of citizenship determined under the General Immigration Law, where he would have had a regular hearing before a Board of Special Inquiry consisting of three immigration inspectors, excluding the first examining inspector.

Second—It is maintained that there was an abuse of discretion on the part of the immigration officials in disregarding the evidence of citizenship presented by and on behalf of Quan Hing Sun.

The appellant submits under this head that the immigration service of the United States, by reason of the promulgation of this Rule 9, have evinced a hostility to the absolute citizenship provided for in Section 1993 of the Revised Statutes. That this hostility has caused them to look upon the cases of the foreign-born sons of

native-born American citizens in a different way than they look upon native-born citizens of the United States. In fact, that instead of recognizing the absolute citizenship provided for in this section of the Revised Statutes, they have regarded it as a sort of naturalization or communicated status, and evinced somewhat of a hostility to these foreign-born citizens, and have subjected them to rules of evidence and rules of procedure which they have not sought to apply to native-born citizens of the United States. The important part of the present case is that because of the death of the father of Quan Hing Sun it was attempted to deny him the absolute citizenship provided for by the said Statute. The decisions of the United States District Court for this District in which this hostility is judicially determined are as follows: *Ex parte Wong Foo*, 230 Fed. 534; *ex parte Leong Wah Jam*, 230 Fed. 540; *ex parte Ng Doo Wong*, 230 Fed. 751; *ex parte Lee Dung Moo*, 230 Fed. 746, and *ex parte Tom Toy Tin*, 230 Fed. 747. Each of these five cases were decided by Judge Dooling, who presides over the District Court for this Division. The Government did not effect an appeal from any of these five cases, but referred the question of law involved to the Attorney General of the United States for his opinion, and this opinion, which was rendered on April 27, 1916, was against the contention of the immigration authorities and supported the principles of law enunciated by Judge Dooling in the matter of Wong Gin Tun and Wong Shim Gim.

Vol., Opinions Attorney General, p.....

In *ex parte Lee Dung Moo*, *supra*, Judge Dooling

held, on page 747, as follows:

"It is manifest from the foregoing quotations, and indeed has also appeared from records submitted here in other cases, that the Immigration Bureau looks upon this statute, in so far as it may be applicable to persons of the Chinese race, with an unfriendly eye. The absolute citizenship therein provided for, and the rights pertaining to such citizenship, are regarded as 'at best only technical,' while to the plain language of the statute is added by construction the provision that it does not apply, unless the foreign-born child of the American citizen shall learn the English language and come to the United States before he is 25 years of age. I conceive it to be the duty of executive as well as of judicial officers fairly and freely to administer the laws of Congress as they find them, whether they agree with the policy or purpose of such laws or not. In the instant case the very law which would entitle the applicant to admission into this country is regarded with such hostility as to be cast into the balance against him. If applicant is the son of a resident American citizen, he, too, is a citizen, and entitled to 'every right as such. The question of relationship should therefore be fairly investigated, with a view to ascertain the truth, and with a perfect willingness to admit him as a citizen under this law, instead of being investigated in a spirit hostile to the law, which lacking the power to repeal, accomplishes the same result by denying to it effect. When one's right as a citizen is examined in that spirit, the hearing given him appears to me to be anything but fair."

In *ex parte Ng Doo Wong*, *supra*, Judge Dooling held on page 752, as follows:

"If this means anything, it means that, no matter what the proof, a foreign-born son of a Chinese native will not be admitted to this country, notwithstanding his citizenship, unless he applies for

admission during his minority or shortly thereafter. But the statute [section 1993, R. S. Comp. St. 1913, p. 3947] is as follows:

“‘All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be, at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.’

“To this statute the Department is adding by construction this proviso:

“‘Provided such children shall come to the United States during their minority.’

“Doubtless Congress might have attached such a proviso, but I do not think the Department has such power. If petitioner is the son of a citizen of the United States, he himself is such citizen, though born abroad and remaining abroad until 27 years of age. Such citizenship is of little value to him, if he may be excluded from this country by the arbitrary rejection of the testimony offered by him solely because he did not, in the opinion of the Department, apply for entry in time. The findings of the Department are conclusive, when supported by evidence, but not when based upon an erroneous construction of the law.”

In *ex parte Leung Wah Jam, supra*, it is held by Judge Dooling, on page 541, as follows:

“This court has recently decided in several cases that when the question of relationship between a citizen of the United States and his alleged son, born in China, is determined adversely, for reasons similar to those above set forth, the hearing resulting in such determination is not fair. Here a favorable determination on the part of the examining inspector is set aside by the Commissioner

and the Assistant Secretary because of the lack of evidence of a 'spirit of American allegiance,' not only on the part of petitioner, but also on the part of his father.' The record does not show any investigation as to whether the father has 'indicated any tendency to Americanism,' and if this consideration could properly be used against petitioner in the investigation of the relationship claimed to exist it should be based upon proof as of any other fact."

In *ex parte Wong Foo*, *supra*, it is held by Judge Dooling, on page 535, as follows:

"If the applicant is in reality the son of an American citizen, even though it be a citizen of Chinese descent, he also is such citizen, and entitled to enter this country as such. The inquiry of the immigration department should be directed, of course, in good faith to the ascertainment of that fact. The burden of proving such relationship is undoubtedly upon the applicant. But that burden should not be increased by throwing extraneous matters into the scales against him. If, indeed, the proof offered by him is to be weighed in the light of his 'father's sense of allegiance to this country,' then certainly that sense of allegiance must be determined in the same manner as any other material fact; that is to say, from the record. I should be loth to hold that the rights of a citizen of this country, even though such citizen were born in China, may be dependent upon the notion of some officer that the father of such citizen had not manifested a proper sense of allegiance; but in this case it is not necessary to pass upon that question, for the reason that it does not appear from the record here that the father's sense of allegiance was ever inquired into at all. It is just assumed without any proof whatever, that 'the father's sense of allegiance is clearly to the country of his ancestors and not to this country.' If the father's sense of allegiance is a proper matter

to be weighed against the applicant, which is questioned here, but not decided, such sense of allegiance must be proved as any other fact. It was evidently the controlling factor in the adverse decision of the Assistant Secretary, and the hearing accorded to the applicant was to that extent unfair."

And lastly, in *ex parte Tom Toy Tin*, it is held by Judge Dooling, on page 749, as follows:

"The view that the citizenship of a person of the Chinese race, who, though born in China, is the son of a native-born American citizen, is a 'technical' instead of a real one, seems to have originated in the Bureau at Washington, and to have drifted downwards through the service until it has inoculated the examining inspectors, so that the apparent purpose of their examination is, not to ascertain the truth, but to exclude all Chinese who, claiming to be citizens by virtue of the citizenship of their fathers, have failed to come to this country during their minority. That the immigration officers have the sole power to pass upon the facts after a fair hearing is not disputed, and has never been disputed, by this court. But the court has several times held in recent cases that a fair hearing is not accorded when the examination, as to relationship, is had in a spirit hostile to that law which provides that:

"All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers may be at the time of their birth citizens thereof, are declared to be citizens of the United States.'

"And where the record itself discloses the fact that the evidence is weighed in that spirit of hostility to the plain provisions of the statute the court is driven to the conclusion that the hearing was unfair."

And again, on pages 749 and 750, as follows:

"Here it is urged that the alleged father, whose citizenship is not questioned, 'has never taken advantage of his rights as an American citizen.' It is in the record that he has so far taken advantage of his rights as to live in this country all his life, save for one trip to China, at which time he claims to have been married and to have begotten the applicant. What other rights he should have exercised is not stated, but there is absolutely no evidence to show that he has not exercised every right as an American citizen. If the right of applicant to land is to be made dependent upon the opinion of some officer that the father should have taken more advantages of his rights as an American citizen than to live in this country, then the record should clearly show wherein the father was delinquent in this regard. This record does not so show, and the statements quoted are manifestly unfair reasons employed in weighing the evidence to applicant's detriment. Upon the whole record the court is of the opinion that applicant's right to enter was not inquired into in that spirit described by Judge Morton in the following terms:

"The essential thing is that there shall have been an honest effort to arrive at the truth by methods sufficiently fair and reasonable to amount to due process of law.' *Chin Loy You* [D. C.], 223 Fed. 833."

This appellant arrived at this port at a time when Rule 9 was in full force, and when the condition mentioned by Judge Dooling in *Tom Toy Tin, supra*, was in existence. The application of the appellant to enter the United States was denied under the provisions of said Rule 9, and also upon the ground that the immigration officials did not believe the relationship existed. [Tr. 22 and 23.] The denial under the provisions of Rule 9 was upon the hypothesis that the native-born

father being dead prior to the application of his son to enter the United States, that there was no citizenship of the father in existence at the time of the application which could be communicated to the son. Upon the question as to whether or not the conclusion that the appellant was not the son of the person claimed as his father, we call attention to the memorandum prepared for the Secretary, which shows, we contend, evidence of unfairness. At the head of this memorandum the following appears:

“Favorable parts of record,

“Only the fact the father said in 1908 that he had one son.

“Adverse feature; age of boy and unconvincing testimony.”

With respect to the statement that the only favorable part of the record was that the father said in 1908 that he had one son, it is strange to relate that in the memorandum itself we find the following:

“The alleged uncle and another Chinese have testified in support of this boy's admissibility. Their stories agree in the main. It was not possible to secure a connected statement from applicant and he contradicted the witnesses in reference to most of the material points about which he would (or could) give information.”

The real reason for the rejection of this applicant, as disclosed by the supplemental memorandum, made after the case had been orally argued by counsel at Washington, would appear the following, which is quoted from the continuation of the memorandum:

“What puzzles the Bureau is to find an answer to the question why, as a matter of practical common sense, the uncle should bring this little child over here, when his own wife and children are in China and obviously the proper place for the child is in a home where he can have the attention of some woman to take the place of his own dead mother. The very impossibility of answering this question satisfactorily upon the hypothesis that the claims made are true leads naturally and almost inevitably to the idea that the story is not true and that the applicant is the son of some Chinaman or some Chinese couple already in this country, but not entitled under the law to bring a child here.”

In weighing and considering the above memorandum, it must be borne in mind that just prior to writing this memorandum the opinion of the Attorney General of the United States had been rendered wherein Rule 9 was held to be in violation of the provisions of Section 1993 of the Revised Statutes. It is contended upon appeal that the reason urged for the rejection of this applicant was in substance and effect the fact that his father was dead and that the record disclosed an attempt to carry out the idea of the original rejection by using the circumstance of the father's death to discredit the evidence presented instead of considering the father's death as an absolute bar to the applicant's admission. Attention is directed to the letter from the appellant's attorneys in Washington, Messrs. Ralston & Richardson, in which the reason for the rejection is given. [Tr. 20-21.]

This letter was introduced in evidence at the hearing without objection, so that the facts therein stated might be considered in the record as evidence. The same may

also be said of the letter of June 22nd, 1916, of the Assistant Commissioner General of Immigration in answer thereto. In this last mentioned letter the following admission appears:

"On the second the Bureau might add that it is quite possible (indeed its recollection is quite clearly to that effect) that in the course of the discussion of the case when it was being orally argued, an intimation may have been given counsel that if this boy had been coming to his own father, instead of to an alleged uncle, the weight and effect of the evidence would have been somewhat different;"

The appellant contends in this matter that what actually was done in this case was to determine the rights of this appellant adversely because of the hostility to the claims of citizenship such as were presented by this appellant, and which was the subject of Judge Dooling's decision particularly in *Lee Dung Moo, supra*, and *Tom Toy Tin, supra*.

The circumstances developed in the record having to do with the Doctor's opinion as to the age of this applicant, and an attempt to discredit his entire case by reason thereof, we have this to say: According to the sworn testimony of this case, which is without disagreement, this appellant was eight years of age when he applied to enter the United States. That he was small or underdeveloped for his years is freely conceded. The examining inspector thought that the appellant was not over five or six years of age. The Medical Examiner of Aliens gave it as his opinion that the appellant was not over five years of age. It is very

possible that the lack of attention and care that was the lot of an orphan boy in China may be responsible for his under physical development, and may have been an actuating factor in the bringing of the appellant to this country. The difference in age is very slight, and one that the experience of mankind might readily make allowances for. It does not appear that the opinion of the Medical Examiner was based upon any scientific data and would appear to be quite an arbitrary expression of personal opinion. This Court had the same feature before it in the case of *Woo Hoo*, 243 Fed. 541, wherein the Court held, on page 543 thereof, as follows:

“The doubt expressed by the Commissioner General as to the alleged age of the applicant was based upon a certificate of two surgeons that after a careful consideration of the physical characteristics, they were of the opinion that ‘his age is within one year either way of 23 years.’ It is not represented that the certificate is based upon any scientific data or otherwise than upon the general appearance of the applicant. Upon such a question the opinion of a surgeon is believed to be of no greater value than that of a layman, and in either case it has but little probative value to show a difference of age of only two years.”

As a principle of law, it is felt that the immigration authorities acted arbitrarily in disregarding the testimony on behalf of this appellant. The immigration authorities prejudicially considered his testimony when they themselves were not able to determine whether the appellant “would (or could) give information.” Being unable to determine this point, it is contended that it was an arbitrary action on their part to conclude the

point adversely to him. The way testimony of children of such tender years should be weighed is amply set forth in Jones on Evidence. We quote the following from this work:

“Section 722 [740] Degree of Credit to be given such testimony.

“Although, in order to prevent a failure of justice, it is often necessary to receive the evidence of children of tender age, every practitioner of experience is sensible of the embarrassments and danger which attend the admission of such evidence. It is true, it may be urged, that the natural language of the child is that of innocence and truth, and that its testimony is apt to be free from the prejudice or sinister motives which too often affect the testimony of adults. On the other hand, it may be urged with equal force that this class of testimony is open to several serious objections. There is the uncertainty whether the witness has the proper conception of the obligation of an oath. Then there is the still greater danger that such testimony may have been prompted and inspired by unscrupulous and interested persons. Says Mr. Stephens: ‘A child will have been taught to say that, if it tells a lie, it will go to the bad place when it dies (which is usually taken to show that it knows the meaning of an oath) long before it has any real notion of the practical importance of its evidence in a temporal point of view; and also long before it has learned to distinguish between its memory and its imagination, or to understand in the least degree, what is meant by accuracy of expression. **It is hardly possible to cross examine a child, for the test is too rough for an immature mind.** However gently the questions may be put, the witness grows confused and frightened, partly by the tax on its memory, partly by the strangeness of the scene, and the result is that its evidence goes to the jury practically unchecked, and has

usually greater weight than it deserves, for the sympathies of the jury are always with it. This is a considerable evil, for in infancy the strength of the imagination is out of all proportion to the power of the other faculties; and children constantly say what is not true, not from deceitfulness, but simply because they have come to think so, by talking or dreaming of what has passed. The evil, however, is one which the law cannot remedy. It would be a far greater evil to make children incompetent witnesses up to a certain age. The only remedy is that judges should insist to juries more strongly than they generally do on the unsatisfactory nature of the evidence of children and on the danger of being led by sympathy to trust in it."

In finally submitting this matter, we feel that the appellant has affirmatively established his right to enter the United States as a citizen thereof, and that the denial of said right by the Immigration authorities was in effect to deny to this appellant the benefits of Section 1993 of the Revised Statutes, for the reason which prompted the Department officials to promulgate Rule 9. In other words we feel it is a duplication of what was so aptly described by Judge Dooling in *ex parte Lee Dung Moo, supra*, wherein he said:

"The question of relationship should therefore be fairly investigated, with a view to ascertain the truth, and with a perfect willingness to admit him under this law, instead of being investigated in a spirit hostile to the law, which, lacking the power to repeal, accomplishes the same result by denying to it effect. When one's right as a citizen is examined in that spirit, the hearing given him appears to me to be anything but fair."

This appellant was released upon parole by Judge Dooling at the hearing, and has remained upon parole

in the custody of his counsel ever since. He has been residing with his uncle in Los Angeles and attending the public schools there. It is felt that in no wise does this case present any substantial or even real evasion or violation of the Chinese Exclusion or Restriction Acts, but on the contrary, is one in which the rights of American citizenship have been amply and fully proved and established. We feel that the appeal should be sustained with directions to issue the writ as prayed for, so that this appellant may be discharged from custody.

Respectfully submitted,

GEORGE A. MCGOWAN,

Attorney for Appellants.

No. 3034

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JACK LESAMIS, JOHN TYAPAY, ANDY GARBIN,
GEORGE STANLEY, and SAM SALLO,

Appellants,

VS.

H. GREENBERG,

Appellee.

BRIEF FOR APPELLEE.

WILLIAM A. GILMORE,

J. F. HOBBS,

Attorneys for Appellee.

No. 3034

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JACK LESAMIS, JOHN TYAPAY, ANDY GARBIN,
GEORGE STANLEY, and SAM SALLO,

Appellants,

VS.

H. GREENBERG,

Appellee.

BRIEF FOR APPELLEE.

Statement of the Case.

This is a suit for an accounting and dissolution of a mining co-partnership. This cause was first before the Circuit Court on appeal from an interlocutory order refusing the plaintiff a receiver in the court below (203 Fed. 678). Subsequently, the case was tried in the court below on its merits, and reached this court on appeal from the decree of the lower court entered on the merits. On the former appeal (Lesamis et al. v. Greenberg, 225 Fed. 449), the complete transcript of all the testimony, evidence and exhibits was before the court,

and the decree of the lower court was affirmed except to modify one of the findings.

When the case reached the lower court again, amended findings were signed and filed and an amended decree entered thereon, in conformity with the opinion and mandate of the appellate court. The appellants now bring the case back to this court on a second appeal, and have combined several appeals in one petition (Tr. pp. 137-139), on the pretext of appealing from the amended decree entered in accordance with the mandate of the appellate court. Appellants attempt to appeal, (1) from the amended decree, (2) from the order of the lower court overruling appellants' motion for amended findings, (3) from the order of the court overruling the appellants' motion to re-amend the findings and decree and make a new accounting between the parties, and (4) from an order of the court refusing to set aside the sale on execution.

Contentions of Appellee.

Appellee contends that, under the rule of "the law of the case" none of these appeals can be maintained or considered except the appeal from the amended decree. And appellee further contends that the amended findings and amended decree, entered by the trial court, were in strict conformity and obedience to the opinion and mandate of the appellate court entered on the former appeal.

Argument and Authorities.

The appellee, plaintiff in the court below, brought this suit for an accounting and dissolution of a mining co-partnership. The suit was tried in the lower court and all of the parties and their attorneys appeared and participated in the trial. A voluminous record of testimony and exhibits was offered before the trial court, which found for the appellee. Thereafter, the appellants took an appeal from the decree, bringing a complete and full transcript of all of the evidence, testimony and exhibits to the appellate court, which was fully examined on the former appeal and the judgment of the trial court affirmed in every particular, except as to one finding pertaining to the construction of the original agreement between the parties, as to the manner of payment for the mining property.

In order for the court to fully understand appellee's position and contention that under the rule of "the law of the case" appellants have had their day in court and that the matters are res judicata, we deem it necessary to direct the court's attention to the errors that were assigned on the former appeal. Appellants on said appeal (Cause No. 2514, Tr. p. 245) assigned twenty-four errors for the court's consideration. Subsequently, on page 8 in their elaborate brief filed by them on said appeal, appellants selected from said twenty-four errors so assigned ten errors, as follows:

"1. The court erred in finding that the \$24,000.00 balance of the purchase price agreed

to be paid by appellee for an undivided quarter of the mining claims mentioned in the complaint were to be paid 'from the net profits of the mining operations' (assignment of error No. 1), and 'from the mining operations of the co-partnership property' (assignment of error No. 9), and 'from the profits of the co-partnership property' (assignment of error No. 12).

2. The court erred in finding that the placer claims mentioned were partnership assets (assignment of error No. 3).

3. The court erred in finding that the mining claims mentioned in the complaint were liable for the debts of the partnership (assignment of error No. 11).

4. The court erred in finding that the leases were let by the partnership and that royalties were payable to the partnership (assignment of error No. 4).

5. The court erred in finding that the claim of Philip Murphy was a debt of the Klerly Creek Mining Co. and in adjudicating said claim and giving it preference over the claims of other creditors (assignment of error No. 7).

6. The court having found in its opinion and findings that Stanley and Sallo, representing Lesamis and Garbin, were entitled to a credit for assessment work done on the claims, erred in failing to recognize and allow this claim in the judgment (assignment of error Nos. 13 and 19).

7. The judgment or decree is erroneous in that it embodies the errors in the findings above specified and further as specified in the 21st assignment of error as follows:

It was final in character, but entered before all partnership matters were disposed of, and without disposition of same.

a. No opportunity was afforded creditors to present their claims.

b. No provision was made for the collection of claims due the firm.

c. No disposition of the attachment of the creditor Murphy was made, and the same was ignored.

d. The claim of \$2400.00 of Stanley and Sallo allowed in the findings, was wholly forgotten. So, also, credit of Frank Lesamis as per testimony of Greenberg, \$1,158.00.

e. The claims of the partners inter esse, after exhausting partnership assets, were left undetermined.

f. No apportionment was made of the balance of the twenty-four thousand dollars due defendants.

g. No partner, master or receiver was appointed to take over the properties and wind up the partnership.

h. The findings were made to operate as an interlocutory judgment of dissolution and partial accounting.

8. The court erred in denying defendants' motion to quash the execution issued herein (assignment of error No. 22).

9. The court erred in denying defendants' motion to continue on terms the sale on execution herein until the determination of the appeal from the judgment herein (assignment of error No. 23).

10. The court erred in confirming the sale on execution herein (assignment of error No. 24)."

After specifying in their brief the said ten errors above quoted, from the said twenty-four errors originally assigned, the appellants then discussed in their said brief six of the said ten errors. The errors so discussed, covering the very errors that

are now assigned on this second appeal by said appellants. We find the appellants on the present appeal assigning (Tr. p. 129) fourteen alleged errors, nearly all of which were the same identical errors assigned on the former appeal, as can be readily seen by a reference to the same. Appellants on this appeal, forgetting that they had only assigned fourteen errors in the court below, as shown by the transcript, have assigned twenty errors in their brief, and a perusal of the twenty errors assigned will show that they have specified all of the errors relied upon on the former appeal, in addition to the alleged error that the trial court did not enter the amended findings and decree in accordance with the mandate of the appellate court on the former appeal.

Counsel for appellants, in opening their argument in their brief, say that some of the errors pointed out might have been made on a re-argument if seasonably discovered, but apologize for not having discovered the same because Alaska is too far away from San Francisco. The appellants on the former appeal, were represented by San Francisco counsel, who was present and made an oral argument in the case and could have very easily filed a petition for a rehearing, which should have been done if appellants were dissatisfied with the decision of the court in the former appeal. It is appellee's contention that a petition for a rehearing was the only remedy of appellants. If they were aggrieved or dissatisfied with the decision of the appellate court

on the former appeal, they should have filed a petition for a rehearing and pointed out any errors or mistakes that were made.

With a complete transcript of all the testimony before the appellate court on the former appeal and after hearing the oral arguments and considering the written briefs filed in the case, the court passed squarely upon all of the material errors assigned in the record.

After holding that the parties meant by “of the first money taken out of the ground”, one-fourth of the gross, instead of one-fourth of the net gold, the court then says in its opinion (*Lesamis et al. v. Greenberg*, 225 Fed. 452) as follows:

“Taking the court’s findings as to the gross products of the mines, which is: For the year 1910, \$16,251.42; 1911, \$9,786.88—aggregating, \$26,038.30—the appellee would be entitled to have one-fourth thereof, or \$6,509.57, applied on the \$24,000 deferred payment. In other words that amount on a settlement would be coming to each of the parties. But, as the business of the firm resulted in a deficit, the adjustment must be apportioned in the payment of the indebtedness of the firm. So apportioning it, the amount of the indebtedness to the mining company of each of the appellants *Lesamis*, *Tyapay*, and *Garbin*, as found by the trial court, would be reduced by \$1,553.88, and that of appellee increased by \$4,661.66, leaving such indebtedness as follows:

<i>Lesamis</i>	\$2,875.33
<i>Tyapay</i>	\$3,149.33
<i>Garbin</i>	\$2,661.52
<i>Greenberg</i>	\$10,628.76
Total	\$19,314.94

The finding of the trial court should be modified to conform to this deduction.

As sales of assets are made, of course, the partners will share equally in the proceeds, and be entitled to have the same applied in that proportion to their indebtedness to the firm and the adjustment in the end will be on the basis of an equal division of the partnership property.

The amount of the indebtedness thus found due by the partners to the firm is the amount of the indebtedness of the firm to Robinson, Magids & Co., or Philip Murphy, the assignee, which is practically all its indebtedness. The testimony shows but one small account above that, of \$2.50, and no one is insisting upon that.

It is next insisted that the mining claims did not constitute partnership property. But we are of the view that such claims were intended by the parties to become partnership property, and they were so treated by the parties while conducting the business of the firm. The claims are therefore subject to the partnership indebtedness as partnership assets.

Again, the appellants urge that the last year's business was conducted by Greenberg alone, and not by and on account of the firm. This is wholly refuted by the strong preponderance of the evidence, and, the trial court so finding, it is unnecessary that we here make further comment upon the testimony.

Further objections are urged, namely, that Robinson, Magids & Co. were given a preference over other claims, that Stanley and Sallo were entitled to credit for assessment work, and that the decree was prematurely entered. We have examined these, and find them without merit.

Error is also assigned because of the court's refusal to quash the execution, on motion directed to that purpose. It is first suggested that

the clerk has no authority to issue execution upon judgments of this nature. The Civil Code of Alaska directs that, on judgments in actions at law, the clerk shall issue the execution. Section 267, Civil Code, Alaska (Fed. Stat. Ann. 101); and by Section 382 (1 Fed. Stat. Ann. 126). This provision is made applicable in equitable judgments, so far as the nature of the judgment may require or admit.

The ordinary practice in equity is, where the property is directed to be sold by the master or the marshal, as the case may be, for the clerk to issue to the officer a certified copy of the decree, and with this in hand the officer executes the decree by sale, return, etc., and upon his return of the sale, if regular, it is confirmed by the court.

If there was irregularity here, in issuing an execution by the clerk, instead of making and delivering to the officer a certified copy of the decree for his execution, that was an irregularity merely, which is cured by the confirmation, and no error can be assigned respecting it at this time. The property seems to have been advertised and sold in conformity with the statute of Alaska Civil Code, Sec. 278 (1 Fed. Stat. Ann. 105).

It is next objected that there was no levy. The Alaska Code is taken bodily from the Oregon statute, and it has been held that, under the Oregon statute, where the judgment is a lien upon real property, no levy of the execution is necessary. This in a suit for foreclosure. *Bank of British Columbia v. Page*, 7 Or. 454. but the usual method of sale in equity procedure is by direction in the decree that the property be sold by a master. 2 Bates on Fed. Eq. Procedure 772. And we see no reason why the practice may not apply in equitable actions, in the jurisdiction of Alaska, where the nature of the judgment is not suited to the ordinary

execution provided for by code. The decree in the case at bar provides that the marshal of Alaska shall sell the assets. It was not requisite for an execution of the decree that any independent or subsequent order of the court be made.

Again, it is urged that, under the motion, the court should have postponed the sale until the appeal to this court was heard. Section 508, Alaska Code (1 Fed. Stat. Ann. 148), provides that all provisions of law regulating the procedure and practice, in cases brought by appeal or writ of error to the Supreme Court or the Circuit Court of Appeals, shall regulate the procedure and practice pertaining to appeals and writs of error from the Alaska courts. The Revised Statutes of the United States provides for supersedeas, and the manner in which it may be obtained. Otherwise the courts will not ordinarily stay execution or postpone sales pending hearing on appeal.

Finding No. 11 will be changed to conform to this opinion, and the decree will be modified accordingly. Otherwise, it will be affirmed, neither party to recover costs on the appeal."

It will be seen, by reading the former opinion, that this Honorable Court then carefully considered the errors assigned and now complained of in this second appeal by appellants, and affirmed the decree of the lower court in every particular, except as to the method or manner in which the payments for the mining claims were to be made by the appellee.

In accordance with the foregoing opinion, the mandate of this court was issued and filed in the lower court (Tr. p. 73), wherein the lower court was specifically ordered and directed as follows:

“On consideration Whereof, it is now here Ordered, Adjudged and Decreed by this court, that finding No. 11 of the said District Court be changed to conform to the opinion of this court, and that the Decree of the said District Court be modified accordingly, and that as so modified, the said Decree be, and hereby is, affirmed, neither party to recover costs on the appeal.”

By referring to the findings of the trial court in the record of the former appeal (Cause No. 2514, Tr. p. 55), we find that findings Nos. XI, XII and XIII, were as follows:

“XI. The court finds that the total indebtedness of said Klery Creek Mining Co., due to said Robinson-Magids & Co., or its assignee, Philip Murphy, with legal interest to date, amounts to \$19,314.94, and that each of the said partners would be indebted to the said Klery Creek Mining Co. for the sum of \$4828.73 less the credits above mentioned, and that the said defendant Lesamis is indebted to the said Klery Creek Mining Co. in the sum of \$4429.21; that the said defendant Tyapay is indebted to the Klery Creek Mining Company in the sum of \$4703.21; that the said defendant Garbin is indebted to the said Klery Mining Company in the sum of \$4215.40; that the plaintiff Greenberg is indebted to the Klery Creek Mining Co. in the sum of \$5967.10.

XII.

The court finds that it was the intent and meaning of the parties in forming said co-partnership that the balance payment of \$24,000 was to be paid from the net profits from the mining operations of the co-partnership property, and that the defendants, Jack Lesamis, Andy Garbin and John Tyapay, have received on the said sum of \$24,000, the total sum of \$5238.19, leaving a balance due to said defend-

ants or their assigns from the net profits, the sum of \$18,761.81.

XIII.

The court finds that the allegations contained in the answers of the defendants that said balance payment was due from the first gold-dust extracted and taken from the undivided one-quarter ($\frac{1}{4}$) interest in said mining property, is not supported by the evidences and is untrue."

In order to strictly conform to the opinion and mandate of the appellate court, it was necessary to modify findings Nos. XII and XIII, as well as No. XI, so we find that when the case reached the lower court, the lower court entered and filed its amended findings (Tr. p. 97), wherein the said findings Nos. XI, XII and XIII, were changed and modified to read as follows:

"XI. The court find that the total indebtedness of said Klery Creek Mining Company, due to the said Robinson-Magids & Co., or its assignee, Philip Murphy, with legal interest to date, amounts to \$19,314.94, and that and each of the said partners would be indebted to the said Klery Creek Mining Company for the sum of \$4828.73, less the credits above mentioned, and that the said defendant Lesamis is indebted to said Klery Creek Mining Company in the sum of \$2875.33; that the said defendant Tyapay is indebted to the Klery Creek Mining Company in the sum of \$3149.33; that the said defendant Garbin is indebted to the said Klery Creek Mining Company in the sum of \$2661.52; that the said plaintiff Greenberg is indebted to the Klery Creek Mining Company in the sum of \$10,628.76.

XII.

The court finds that it was the intent and meaning of the parties in forming said co-partnership that the balance payment of \$24,000 was to be paid from one-fourth of the gross output from the mining operations of the co-partnership property, to which the said grantee, H. Greenberg, would be entitled, and that the defendants, Jack Lesamis, Andy Garbin and John Tyapay have received on the said sum of \$24,000, the total sum of \$5238.19, leaving a balance due to said defendants or their assigns from the one-fourth gross output, the sum of \$18,761.81.

XIII.

The court finds that the allegations contained in the answers of the defendants that said balance payment was due from the first gold-dust extracted and taken from the undivided one-fourth ($\frac{1}{4}$) interest in said mining property, is supported by the evidence, and is true."

Based on said amended findings, the trial court thereafter entered its amended decree in conformity to the opinion and mandate of this court (Tr. p. 111), changing and modifying the original decree as directed by the appellate court, and in no other particular.

We contend that the only point to be considered by the appellate court on this appeal was whether or not the trial court obeyed the mandate issued on the former appeal. The amended findings and the amended decree show that the trial court strictly and definitely carried out the orders of the appellate court and that its amended decree in this regard should be affirmed. We contend, further, that all

of the other alleged appeals joined with this appeal should be dismissed for want of merit.

“If the directions of the mandate are precise and unambiguous, it is the duty of the lower court to carry it into execution without looking elsewhere, even to the opinion, for authority to alter its meaning.”

West v. Brashear, 14 Pet. (U. S.) 51.

For correction of a supposed error in the appellate judgment, another appeal will not lie from a compliance therewith—the only remedy is by rehearing in the appellate court.

3 Cyc., 489;

Jackson v. Tift, 23 Ga. 46;

Boggs v. Williard, 22 Am. Rep. 77;

Gillespie v. Scott, 32 La. Ann. 767;

Jenkins v. Guaranty Trust Co., 38 Atl. 695;

Merrimon v. Lyman, 36 S. E. 44;

Anderson v. Woodward, 24 S. E. 1037;

Lowell v. Ball, 58 Tex. 562;

Southard v. Russell, 16 How. (U. S.) 547.

When the mandate reached the lower court, a new trial was unnecessary and no further evidence was offered, nor has the evidence or the record been changed in any particular whatever, but stands today the same as it did on the former appeal except as to the amended findings and amended decree as above set forth.

“It is the general rule that, as to those questions embraced therein, the decision of the appellate court is binding on the lower court

in its further proceedings, even though such decision be in fact erroneous; and, where there is no change in the facts, it is the duty of the court below to adopt and follow the views expressed. The decision stands as the law of that particular case, even though principles inconsistent with those on which it is based have been established in other cases."

3 Cyc., 492;

Gaines v. Caldwell, 148 U. S. 228.

"It is a rule of general application that the decision of an appellate court in a case is the law of that case on the points presented throughout all the subsequent proceedings in the case in both the trial and the appellate courts, and no question necessarily involved and decided on that appeal will be considered on a second appeal or writ of error in the same case, provided the facts and issues are substantially the same as those on which the first decision rested."

4 Corpus Juris, 1093.

The application of this general rule is shown and supported by the following cases:

Stone v. Southern Ill. Bridge Co., 206 U. S. 267;

New York Mutual Life Ins. Co. v. Hill, 193 U. S. 551;

Chamberlain v. Browning, 177 U. S. 605;

Stone Co. v. U. S., 195 Fed. 68;

U. S. v. Axman, 193 Fed. 644;

Higgins v. Eaton, 188 Fed. 938 (reversed, on other grounds, 202 Fed. 75);

Development Co. of America v. King, 170 Fed. 923;
 Mutual Reserve Fund Life Association v. Ferranbach, 144 Fed. 342;
 Burow v. Grand Lodge, 134 Fed. 1021;
 Olsen v. N. P. Lumber Co., 119 Fed. 77;
 N. Y. R. Co. v. Lehtohner, 204 Fed. 775;
 National Steamship Co. v. Kans. C. H. P. I. Co., 182 Fed. 54;
 Ouray County v. Geer, 108 Fed. 478;
 Mohrenstecher v. Westervelt, 87 Fed. 157.

This same rule has been announced by the Supreme Court of every state in the union, time and time again. In support of the same, we cite the court to the following state cases:

Arizona-Parral M. Co. v. Forbes, 146 Pac. 504 (Ariz.);
 Great Plains W. Co. v. Lamar Canal Co., 71 Pac. 1119 (Colo.);
 New Haven Trust Co. v. Camp, 76 Atl. 1100 (Conn);
 Anthony Shoals Power Co. v. Forston, 83 S. E. 137 (Ga.);
 Nampa v. Nampa, 131 Pac. 8 (Idaho);
 Spitzer v. Schlatt, 94 N. E. 504 (Ill.);
 Cleveland R. C. v. Lynn, 177 Ind. 311;
 Blizzard v. Growers' Canning Co., 148 N. W. 973 (Iowa);
 Taylor v. Pierce, 220 Mass. 254;
 Myers v. Erwin, 180 Mich. 469;
 Blakely v. J. Neils L. Co., 128 Minn. 465;

Henry v. Lincoln, 97 Neb. 865;

People v. Queens School Board, 161 N. Y.
598;

Beard v. Royal Neighbors of America, 60
Or. 41;

Melker v. Hazen, 247 Pa. 122;

Galveston Co. v. Galveston Gas Co., 72 Tex.
509;

Houtz v. Union Pac. P. R. Co., 35 Utah 220;

Silvain v. Benson, 83 Wash. 271;

Roach v. Sanborn Lumber Co., 140 Wis. 435.

“The general rule, nakedly and baldly put, is that legal conclusions of law, announced on a first appeal, whether on the general law or the law as applied to the concrete facts, not only prescribe the duty and limit the power of the trial court to strict obedience and conformity thereto, but they become and remain the law of the case in all after-steps below or above on subsequent appeal.”

Mangold v. Bacon, 237 Mo. 496;

Fletcher v. Hickman, 208 Fed. 118;

Jeffrey v. Osborne, 145 Wis. 351.

“The ‘law of the case’ is a phrase which has been formulated to give expression to the rule that the final judgment of the highest court upon a question of law arising between the parties to an action on a given state of facts, establishes the right of the parties in and to that controversy and is a final determination thereof, and, like a final judgment in any other case, estops the parties thereto, from afterwards questioning its correctness.”

Klauber v. San Diego Street Car Co., 98 Cal.
105;

“The law of the case, as applied to a former decision of an appellate court merely expresses the practice of the courts in refusing to reopen what has been decided.”

Mesinger v. Anderson, 225 U. S. 436.

“Assignments of error determined on a former appeal, adversely to appellants taking a second appeal, will be overruled.”

Harris v. Wagon, 162 S. W. 2.

“That different reasons in support of the question are given on the second appeal does not alter the rule.”

Ruttle v. What Clear Coal Co., 125 N. W. 787 (Mich.).

“The reason for the rule of the finality of the appellate decision is sometimes alleged, without direct reference to either *stare decisis* or *res judicata*, to be found in the want of power in an appellate court to modify its own judgments otherwise than on a rehearing, and in that the issuance of a mandate for a retrial takes the case out of its jurisdiction.”

Peck v. Sanderson, 18 How. (U. S.) 42;

Balch v. Haas, 73 Fed. 974.

The rule has been said to be

“Necessary to enable an appellate court to perform its duties satisfactorily and efficiently, which would be impossible if a question, once considered and decided by it, were to be litigated anew in the same case upon any and every subsequent appeal.”

Great Western Telephone Co. v. Burnham,
162 U. S. 339.

“There would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticism on their opinions, or speculate of chances from changes in its members.”

Roberts v. Cooper, 20 How. (U. S.) 467;
Standard Sewing Machine Co. v. Leslie, 118
Fed. 557.

“In accordance with the above general rule, where, after a definite determination, the court has remanded the cause for further action below, it will refuse to examine questions other than those arising subsequently to such determination and remand, or other than the propriety of the compliance with its mandate.”

U. S. v. Camou, 184 U. S. 572;
People v. Ill. C. R. Co, 184 U. S. 77;
U. S. v. N. Y. Indians, 173 U. S. 464;
Taenzer v. Chicago R. Co., 191 Fed. 543;
Beiseker v. Moore, 174 Fed. 368;
Haley v. Kilpatrick, 104 Fed. 647;
Gregory v. Pike, 77 Fed. 241.

“If the court below has proceeded in substantial conformity to the directions of the appellate court, its action will not be questioned on a second appeal.”

U. S. v. N. Y. Indians (supra);
MacKell v. Richards, 116 U. S. 45;
Humphrey v. Baker, 103 U. S. 736;
Cook v. Porter, 11 Wall. 672;
Tyler M. Co. v. Last Chance M. Co., 97 Fed.
394;
In re Pike, 76 Fed. 400;

Martin v Platt (N. Y.) 30 N. E. 66;
 Great N. R. Co. v. Western U. T. Co., 174
 Fed. 321.

The latter case is one of the principal cases cited and relied upon by appellants in their brief, but we fail to find any consolation for them in the court's opinion. In that case the court says:

“It is the established rule in the courts of the United States that when a case comes the second time before an appellate court, by appeal upon the same facts, what was decided at the first appeal constitutes the law of the case, and will not be again examined touching its soundness.”

And again the court says in the same case:

“A second appeal to the same court can not be made to perform the office of a petition for rehearing or a bill of review.”

“Although there are cases which hold that an appellate tribunal is bound by its prior decision only on the points distinctly made and determined, and not on points which might have been raised, but were not, the general rule is that, on a second or subsequent appeal or writ of error, the court will not consider matters assigned as error, which arose prior to the first appeal or writ of error, and which might have been raised thereon, but were not, nor matters appearing in the original record which might have been corrected on the first hearing, but were not urged.”

Clark v. Brown, 119 Fed. 130;
 Rep. M. Co. v. Tyler M. Co., 79 Fed. 733.

“It may be stated generally that a court of review is precluded from agitating questions which were propounded, considered, and decided, on a previous review; the decisions agree that, as a general rule, when an appellate court passes upon a question and remands the cause for further proceedings, the question there settled becomes ‘the law of the case’ upon a subsequent appeal; the only mode for reviewing the decision on the prior appeal being by motion for a rehearing.”

2 R. C. L., Sec. 187;

Wells on Res Adjudicata and Stare Decisis,
Sec. 613, p. 569.

If the lower court had misconstrued the mandate or if the appellate court in issuing its mandate had remanded the case for further proceedings in the discretion of the trial court and the trial court had then refused to give appropriate relief, or if some mistake had been made by the trial court in attempting to carry out the mandate of the appellate court, then there would be some reason for citing and discussing the cases that are relied upon by the appellants in their brief, but under the facts in the case at bar, we fail to see where any of said decisions so discussed and cited by appellants, have any bearing whatever, in deciding this appeal. The transcript shows conclusively that the trial court carried out the terms of the mandate to the letter and that no reason for a second appeal exists.

The whole brief of appellant in this case, is a caustic criticism, reagitation, and an attempted re-examination of the decision of the former appeal.

Counsel for appellants seem to devote most of their brief in an attempt to criticise the decision of the lower court and necessarily the decision of the appellate court on the former appeal in affirming the lower court, and in an attempt to secure a rehearing of their alleged grievances. The transcript in the case shows that when the mandate was filed in the lower court, the appellants there sought to have the trial court enter into a new accounting between the co-partners. They there attempted to get an accounting by setting up a lot of imaginary facts by affidavit that were not in evidence at the former trial and their motion was properly and promptly overruled by the trial court in obedience to the mandate of the appellate court.

On page 18 of appellants' brief on this appeal, counsel states: "An examination of the findings in this case will show that the method of accounting by the trial court was so unique and so simple as to *create suspicion*." Such language is insolent and contemptuous, especially in view of the fact that this Honorable Court had already, in the former appeal, affirmed the accounting made by the trial court.

We do not deem it necessary to discuss the various points in the evidence mentioned by the appellants in their brief for the reason that we covered all of said points in our brief in the former appeal and if this Honorable Court deems it necessary to consider any of said points, we respectfully refer the court to our former written brief on file

in the former appeal (Cause No. 2514), where all of the points, discussed by appellants, are thoroughly answered.

In their brief, the appellants complain bitterly because certain indebtedness that they claim the Klery Creek Mining Company owed to Stanley and Sallo, Lesamis and others remained unpaid. To show the court how ridiculous and untrue the contention is, we cite the court to their sworn answer in the cause (Tr. p. 29), wherein they state as follows:

“These defendants further allege that the only indebtedness of the Klery Creek Mining Company is a small account in favor of S. B. Marshal and Cayhill, in the sum of \$2.50, and that these defendants are abundantly able to pay the same.”

This court in its opinion in the former appeal in commenting on the indebtedness, said that no one was insisting on this small amount being paid. The truth is that the said item was long since paid by the appellee, as he has had to pay everything else since he first met the appellants.

Should the court conclude that it was necessary to determine whether any injustice had been done the appellants, we submit that in reading the transcript on the former appeal, the court will find that the record is undisputed that Greenberg paid to the appellants the sum of \$2000 for groceries and supplies, \$6000 in cash and over \$5000 in gold and gold-dust and that said appellants never, at any time, advanced a dollar out of their pockets to carry on

the mining enterprise; that when the partnership was dissolved, it had an indebtedness of over \$19,000, which was owed to the firm of Robinson-Magids & Co., of which Greenberg was a co-partner; that Greenberg has had to pay the said \$19,000 to his mercantile firm and has never received a cent in contribution from the appellants. The facts are, that the mining claims have been forfeited and abandoned as worthless and Greenberg has had to pay the indebtedness of the mining co-partnership because he was solvent. The appellants are insolvent and notwithstanding the fact that Greenberg has paid the sum of \$6000 in cash to them out of his pocket, \$2000 in groceries, and paid them over \$5000 from the gold-dust extracted from the claims and has paid the debts of the firm amounting to over \$19,000, he has never molested them by even taking out an execution to attempt to recover a cent from them since the decree was affirmed in the former appeal. Most of the appellants have left that country and departed and the only ones that remain to make trouble and further expense by this second appeal and other vexatious suits subsequently brought at Nome, are Stanley and Sallo, whom the record shows were the instigators of all the trouble between the co-partners.

The record in the former appeal conclusively shows that this litigation never would have occurred if it had not been for said Stanley and Sallo. The appellee contends that this appeal is being prosecuted by said Stanley and Sallo with

no other purpose than to harass appellee by continuing the litigation.

The history of this case shows that at the trial in the court below, the appellee submitted all the evidence within his reach to show and inform the court of the exact amount of assets and expenses, and aided and assisted the court in every way within his power to arrive at a correct accounting. On the other hand, the record shows that the appellants, the defendants in the court below, in their answers denied that the co-partnership existed beyond the year of 1910, and did everything within their power to prevent an accounting, resisting appellee's efforts to reach a correct accounting by taking possession of and holding the books and records of the concern, and by resisting appellee's efforts to have a receiver appointed to collect the royalty and other assets of the mining co-partnership. In view of such conduct, it ill-becomes the appellants to now criticise the trial court and the appellate court for not rendering an accounting according to their views.

We submit that this cause, having been fully and fairly decided by this Honorable Court on the former appeal, and the trial court having fully complied with the opinion and mandate of this court on said former appeal, that this litigation should be terminated by an order dismissing the said appeals and

affirming the amended decree entered by the lower court.

Respectfully submitted,

WILLIAM A. GILMORE,

J. F. HOBBS,

Attorneys for Appellee.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

QUAN HING SUN and JUNG LIM,
Appellants,

vs.

EDWARD WHITE, Commissioner of
Immigration for the Port of San
Francisco,
Appellee,

APPELLEE'S REPLY BRIEF

Upon Appeal from the Southern Division of the United States
District Court for the Northern District of
California, First Division.

ANNETTE ABBOTT ADAMS,
United States Attorney,

C. F. TRAMUTOLO,
Asst. United States Attorney.
Attorneys for Appellee.

Filed this.....day of September, 1918.....

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

— 314 —

100

12611

No. 3039

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

QUANG HING SUN and JUNG LIM,
.. *Appellants,*

vs.

EDWARD WHITE, Commissioner of
Immigration for the Port of San
Francisco,
Appellee,

APPELLEE'S REPLY BRIEF.

Statement of the Case.

The appellant Quan Hing Sun arrived at the Port of San Francisco, California, on the S. S. "China," March 11, 1916, accompanied by an alleged uncle, Quan Foo. He applied for admission to the United States as the son of a native, basing his right to admission on the grounds that he was the foreign born son of one Quan Hay, a native born Chinese person, and as such was entitled to admission as a citizen of the United States, under Section 1993 R. S. He was given the usual examination accorded to Chinese applicants for admission to the

United States, both under the United States Immigration laws and the Chinese Exclusion Laws, Rules and Regulations and was refused admission by the Commissioner of Immigration for the Port of San Francisco. An appeal was taken from the said Commissioner's decision to the Secretary of Labor, who affirmed the excluding decision of the said Commissioner. Petition was then made to the Southern Division of the United States District Court for the Northern District of California, First Division, for a writ of habeas corpus, which was denied.

ARGUMENT.

As to the first point raised by appellant, Rule 3 of the Chinese Regulations provides as follows:

“Chinese aliens shall be examined as to their right to admission under the provisions of the immigration law and rules as well as under the provisions of the Chinese-exclusion treaty, laws, and rules. As the former law and rules relate to aliens generally, the status of Chinese applicants must be first determined thereunder; then, if found admissible under the immigration law and rules, their status under the Chinese-exclusion law and rules shall be determined. In order to avoid inconvenience, delay, or annoyance to Chinese applicants through misunderstanding, and in the interest of good administration, examination under both sets of laws and rules shall be made, in the order stated, only at the ports named and in the manner specified in Rule 1 hereof.”

Persons of Chinese descent are examined under the Immigration laws only so far as to determine whether or not they are comprehended within the classes enumerated therein as being excluded from admission into the United States, as provided in Section 3 thereof, which said section applies to Chinese as well as other aliens seeking admission into the United States.

Looe Shee vs. North, C. C. A. 9, 170 Fed. 566.

Whether or not a person of Chinese descent applying for admission into the United States as a citizen thereof, is a citizen and therefore entitled to admission as such, is a question of fact, the burden of proving which rests with the applicant. That fact is determined by the method and gauge provided for in the Chinese Exclusion laws and not under the general Immigration laws. It appears from the Bureau record on file as Exhibit "A" in this case, that this method was followed and upon the failure of the applicant to establish his claimed status as a citizen he was refused admission.

As to the second point raised in appellant's brief—that of the abuse of discretion on the part of the Immigration officials in disregarding the evidence of citizenship presented by and on behalf of Quan Hing Sun, counsel dwells at length on what was at that time Rule 9 (Trans. pp. 15, 16, 17) of the Chinese Regulations as they stood when the said Quan Hing Sun arrived at the Port of San Francisco.

It is true that this rule was promulgated by the Department of Labor October 15, 1915, and was in force and binding upon the administrative officers of that department at the Port of San Francisco until some time in April, 1916, when said rule was amended by striking out paragraphs (f) and (g) thereof, and the following substituted therefor:

“The lawful wife of an American citizen of the Chinese race may be admitted for the purpose of joining her husband and the lawful children of such a citizen partake of his citizenship and are therefore entitled to admission. In every such case convincing evidence of citizenship and relationship shall be exacted.”

In affirming the excluding decision of the Commissioner at the Port of San Francisco, the Bureau, on page 52 of its record, uses the following language:

“You are advised that the Secretary has affirmed the excluding decision of your office on the ground *that the relationship has not been established.*”

There is no reference whatever made to any other grounds on which the Commissioner's decision was affirmed.

The Court below, in discharging the writ of habeas corpus (Trans. pp. 32, 33) expressed the following opinion:

“It appears from the return herein, and the records of the Department introduced in support of it that the petitioner, now held for de-

portation, was excluded because the Department was not satisfied that petitioner was really the son of Quan Hay, an American citizen, as claimed. The hearing accorded seems to have been fair, and the findings of the Department under such circumstances are not open to review in this proceeding.

“The writ will therefore be discharged, and the petitioner remanded for deportation.”

It is submitted that no prejudice or unfairness appears in the record and that the facts disclosed therein fully warrant the conclusions arrived at by the Department.

Respectfully submitted,

ANNETTE ABBOTT ADAMS,

United States Attorney,

C. F. TRAMUTOLO,

Asst. United States Attorney.

Attorneys for Appellee.

No. 3039

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

QUAN HING SUN and JUNG LIM,	} <i>Appellants,</i>
vs.	
EDWARD WHITE, Commissioner of Immi- gration for the Port of San Francisco,	} <i>Appellee.</i>

PETITION FOR REHEARING ON BEHALF OF APPELLEE.

ANNETTE ABBOTT ADAMS,
United States Attorney,

C. F. TRAMUTOLO,
Asst. United States Attorney,
Attorneys for Appellee.

No. 3039

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

QUAN HING SUN and JUNG LIM,	} <i>Appellants,</i>
vs.	
EDWARD WHITE, Commissioner of Immi- gration for the Port of San Francisco,	} <i>Appellee.</i>

PETITION FOR REHEARING ON BEHALF OF APPELLEE.

To the Honorable William B. Gilbert, Presiding
Judge and the Associate Judges of the United
States Circuit Court of Appeals for the Ninth
Circuit:

Appellee respectfully petitions the United States Circuit Court of Appeals for the Ninth Circuit for a rehearing in the above entitled cause following the judgment and opinion filed therein on October 11, 1918, whereby the decree of the United States District Court for the Northern District of California, First Division, was reversed, and respectfully asks that further consideration be given to certain propositions of law bear-

ing upon the case and to certain statements made in appellants' brief which do not coincide or agree with the facts as disclosed in respondent's Exhibit "A."

It is argued by appellants that a person of Chinese descent seeking admission into the United States, claiming to be a citizen thereof, is by right entitled to have his status as a citizen and his right of admission as such determined by a Board of Special Inquiry, as provided by Sections 24 and 25 of the General Immigration Act of February 20, 1907 (34 Stats. at L. 898), instead of by the gauge and method provided for in the Chinese Exclusion Act and that there cannot be two separate ways of determining American citizenship with due regard to the equal rights of all citizens before the law.

It is the Government's contention that all Chinese persons and persons of Chinese descent applying for admission into the United States, whatever the ground on which the right to enter the country is claimed, as well when it is citizenship, as when it is domicile, and the belonging to a class exempted from the Exclusion Acts, are subject to examination as to their right of entry under the provisions of the Chinese Exclusion Laws and the Rules and Regulations issued pursuant thereto. That the general Immigration Act and the Chinese Exclusion Laws are two separate and distinct acts, applying to different classes of aliens and each is to stand in its integrity and efficacy.

The first general Immigration Act was passed March 3, 1891 (26 Stat. at L. 1084). Under Section 7 of this Act the office of Superintendent of Immigration was created. It also provides that "the Superintendent of Immigration shall be an officer of the Treasury Department under the control and supervision of the Secretary of the Treasury."

Section 8 provides that "all decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final, unless appeal be taken to the Superintendent of Immigration, whose action shall be subject to review by the Secretary of the Treasury."

No Board of Special Inquiry was created under this statute, the decision in each case resting in the individual inspector with appeal in case of an adverse decision to the Superintendent of Immigration and the Secretary of the Treasury.

A Board of Special Inquiry was first created by the Act of March 3, 1893 (27 Stat. at L. 569), entitled "An Act to Facilitate the Enforcement of Immigration and Contract Labor Laws of the United States." Section 5 of the Act provides that "it shall be the duty of every inspector of arriving alien immigrants to detain for a special inquiry under Section 1 of the Immigration Act of March 3, 1891, every person who may not appear to him to be clearly and beyond a doubt entitled to admission and all special inquiries shall be conducted by not less than four officials acting as inspectors, to be

designated in writing by the Secretary of the Treasury or by the Superintendent of Immigration for conducting special inquiries; and no immigrant shall be admitted upon special inquiry except after a favorable decision made by at least three of said inspectors and any decision to admit shall be subject to appeal by any dissenting inspector to the Superintendent of Immigration, whose action shall be subject to review by the Secretary of the Treasury, as provided in Section 8 of said Immigration Act of March 3, 1891."

Section 10 of the Act provides however "*that this Act shall not apply to Chinese persons.*"

In the General Appropriation Act of August 18, 1894, (28 Stat. at L. 390), it was enacted that "in every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury."

By the Act of March 2, 1895 (28 Stat. at L. 780), it was provided that the "Superintendent of Immigration, who shall hereafter be designated as Commissioner General of Immigration and in addition to his other duties shall have charge under the Secretary of the Treasury of the administration of the Alien Contract Labor Laws."

By the Act of June 6, 1900 (31 Stat. at L. 611), it was

provided that "hereafter the Commissioner General of Immigration, in addition to his other duties, shall have charge of the administration of the Chinese Exclusion Laws and of the various Acts regulating immigration into the United States, its territories, and the District of Columbia under the supervision and direction of the Secretary of the Treasury."

Up to the time of the passage of the Act of June 6, 1900, the administration of the Chinese Exclusion Laws was vested in the Collector of Customs at the various ports of entry, subject to the supervision and direction of the Secretary of the Treasury, while the administration of the Immigration Act was vested in the Superintendent of Immigration and inspectors appointed at the various ports under the supervision and direction of the Secretary of the Treasury.

The Act of March 3, 1903 (32 Stat. at L. 1213) entitled "An Act to Regulate the Immigration of Aliens into the United States," provides in Sections 10, 24 and 25 thereof for the appointment of boards of inquiry and defines the duties and powers of such boards.

Section 23 provides that "the duties of the Commissioners of Immigration shall be of an administrative character to be prescribed in detail by regulations prepared under the direction, or with the approval of the Secretary of the Treasury."

Section 36 of the Act provides "that all Acts and parts of Acts inconsistent with this Act are hereby

repealed; *provided, that this Act shall not be construed to repeal, alter or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent.*"

By the Act of February 14, 1903, entitled "An Act to Establish the Department of Commerce and Labor" (32 Stat. at L. 825-828), the Commissioner General of Immigration, the Bureau of Immigration and the Immigration Service were transferred from the Treasury Department to the Department of Commerce and Labor and by the Act of March 4, 1913 (37 Stat. at L. 738) to the Department of Labor.

The Act of February 20, 1907 (34 Stat. at L. 898) provides in Section 10, 24 and 25 for the creation of boards of special inquiry and defines their powers and duties thereunder. Section 23 of the Act provides "that the duties of the Commissioners of Immigration shall be of an administrative character to be prescribed in detail by regulations prepared under the direction or with the approval of the Secretary of Commerce and Labor."

Section 43 of the Act provides "that the Act of March 3, 1903, being an Act to regulate the immigration of aliens into the United States, except Section 34 thereof and the Act of March 22, 1904, being an Act to extend exemption from head tax to citizens of Newfoundland entering the United States and all Acts and parts of Acts inconsistent with this Act are hereby repealed; *provided, that this Act shall not be construed*

to repeal, alter or amend existing laws relating to the immigration or exclusion of Chinese persons, or persons of Chinese descent."

There is not at the present time, nor has there ever been, any provision made in the Chinese Exclusion Laws for the examination by a Board of Special Inquiry of Chinese persons seeking admission into the United States. The law, itself, is silent on the subject except so far as it provides in certain sections that the Secretary of the Treasury is authorized to prescribe such rules as are necessary to carry out said acts.

Section 8 of the Act of September 13, 1888 (25 Stat. at L. 476 and 477) provides "that the Secretary of the Treasury shall be and he hereby is authorized and empowered to make and prescribe and from time to time to change and amend such rules and regulations not in conflict with this Act as he may deem necessary and proper to conveniently secure for such Chinese persons as are provided for in Articles second and third of the said Treaty between the United States and the Empire of China the rights therein mentioned *and such as shall also protect the United States against the coming and transit of persons not entitled to the benefit of the provisions of said Articles.*

Section 1 of the Act of April 29th, 1902, as amended and enacted by Section 5 of the Deficiency Act of April 27, 1904 (32 Stat. at L. 176; 33 Stat. at L. 394-428) provides that "all laws in force on the 29th day of April, 1902, regulating, suspending or prohibiting the coming

of Chinese, *or persons of Chinese descent*, into the United States and the residence of such persons therein, including Sections 5, 6, 7, 8, 9, 10, 11, 13 and 14 of the Act entitled "An Act to Prohibit the Coming of Chinese Laborers into the United States, approved September 13, 1888, be and the same are hereby re-enacted, extended and continued without modification, limitation or condition."

Section 2 provides that the "Secretary of the Treasury is hereby authorized and empowered to make and prescribe, and from time to time, change such rules and regulations not inconsistent with the laws of the land as he may deem necessary and proper to execute the provisions of this Act and of the Acts hereby extended and continued, and of the Treaty of December 8, 1894, between the United States and China, and with the approval of the President to appoint such agents as he may deem necessary for the efficient execution of said Treaty and said Acts."

The Supreme Court in the *Woo Jan* decision, rendered January 28, 1918, U. S. Advanced Opinions 1917, p. 230, has held, in construing Section 43 of the Act of February 20, 1907, that "from all the provisions of the Act (Feb. 20, 1907) the Chinese Exclusion Laws are excepted. They, the latter, are to stand in their integrity and efficacy." Quoting further from this decision, the Court said:

"We are admonished at the outset by the diversity of opinion that there are grounds for

opposing contentions. Indeed, Secs. 21 and 43 seem to be, at first impression, in irreconcilable conflict. The declaration of Sec. 21 is that the power of the Secretary of Labor shall extend to taking into custody and returning to the country from whence he came whoever is subject to deportation under the provisions 'OF ANY LAW OF THE UNITED STATES.' The universality of the declaration would seem to preclude exception and compel a single judgment. But, passing on to Sec. 43, we find another law preserved and kept in function,—a function so firm and exclusive that it is provided that the act, of which Sec. 21 is but a part, shall not be construed to 'repeal, alter or amend' it. Let us repeat the language—'Provided, That this act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent.' There is, therefore, an express qualification of the universality of Sec. 21; indeed, from all of the provisions of the act the Chinese Exclusion Laws are excepted. They, the latter, are to stand in their integrity and efficacy."

* * * * *

"We must, indeed, assume that Sec. 43 was intended to be sufficient of itself,—fully exclusive and controlling.

We might terminate the discussion here and leave the case to the explicit language of Sec. 43 that Sec. 21 (to pass at once to the particular) 'shall not be construed to alter, repeal or amend existing laws relating to the immigration or exclusion of Chinese persons.' The Government, however, contends, as we have seen, that this court has decided to the contrary in *United States vs. Wong You*, *supra*.

The Government's understanding of the case is erroneous. It concerned Chinese persons, but not

the Exclusion Laws, and it was decided that such persons might offend against the Immigration Act and be subject to deportation by the Department of Labor if they should so offend. This was the extent of the decision and its language was addressed to the contention that the latter act was applicable to all persons except Chinese because of Sec. 43. The contention was declared to be untenable, and it was untenable. The case, therefore, is different from that at bar, and the opinion was considerate of the difference; that is, considerate of the difference between the Immigration Act and the Exclusion Laws.

This difference must be kept in mind. The Chinese Exclusion Laws have not the character or purpose of the Immigration Act."

This decision unmistakably holds that the Chinese Exclusion Laws and the general Immigration Act are two separate and distinct laws and are to stand as such in their integrity and efficacy. From this decision it seems reasonable to hold that a Chinese person being an alien, applying for admission into the United States, who is found to belong to one of the excluded classes enumerated in the Immigration Act and whose admission is prohibited thereby, might properly be excluded on the grounds that he is seeking admission in violation of that Act, but if, upon examination, he is found admissible under the Immigration Act, his right to final admission must be determined under the Chinese Exclusion Acts, which apply to all Chinese persons and persons of Chinese descent, whatever the ground claimed as a right of admission.

In the case of the United States vs. Ju Toy, 198 U. S. 253, the Court says:

“It is established, as we have said, that the Act purports to make the decision of the Department final, whatever the ground on which the right to enter the country is claimed, as well when it is citizenship as when it is domicile and the belonging to the class excepted from the Exclusion Acts.”

It is admitted that a person of Chinese descent, who is a citizen of the United States, is entitled to all the rights and privileges enjoyed by citizens of any other race, but a mere claim of citizenship made by a person of Chinese descent applying for admission to the United States does not of itself establish that fact and such fact can only be established and his right to enter the country be determined in conformity with the Chinese Exclusion Laws and the Rules and Regulations issued in connection therewith.

It is a well established principle that where Congress, by constitutional enactments has entrusted to executive officers as a special tribunal determination of all questions of fact, including a claim of citizenship, relating to the right of entry into the United States of Chinese applying therefor, the decision of such executive officers is final, where no abuse of authority is shown. This point was decided in the case of Ekiu vs. United States, 142 U. S. 660, wherein the Court says:

“And Congress may, if it sees fit, as in the statutes in question in United States vs. Jung Ah Lung just cited, authorize the Courts to investigate

and ascertain the facts on which the right to land depends. But, on the other hand, the final determination of these facts may be entrusted by Congress to executive officers; and in such a case, as in all others in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or contravert the sufficiency of the evidence on which he acted."

The attention of this Honorable Court is called in particular to the following statements contained in appellants' brief, commencing at the bottom of page 7 thereof:—

"The Immigration procedure allows a complete inspection of the entire record, including the findings and reasonings of the Board of Special Inquiry. The procedure under the Chinese Exclusion Laws withholds this matter from the applicant for admission, only advising him of the final result."

The language of the opinion (page 4) follows closely that of the brief above quoted.

The statements made in the above quotation constitute a bold perversion of the facts as they appear in the record in respondent's Exhibit "A," which was an exhibit in this case. On page 44 of said exhibit will be found the following receipt given by Messrs. McGowan & Worley, attorneys for the applicant:

"Form 2541

San Francisco, Cal., April 3, 1916.

Commissioner of Immigration,
Port of San Francisco.

Sir:—

In re: Quan Hing Sun, Son of Nat. No. 15077/5-30,
ex. S. S. China, 3/11, 1916:

In the above entitled case, this date I have been given full opportunity to review the entire record from page 1 to 42, inclusive.

Remarks: Except pages 24, 34, 35 and 36.

Exhibits att'd hereto—

10259/49; 15077/3-8; 12986/7-13.

Respectfully,

(Signed) McGowan & Worley,

Attorney for applicant."

From this it will be seen that the attorneys were permitted to see the entire record in the case, including three exhibits and were only denied the report of the inspector handling the case which was made to the Commissioner of Immigration but which contained no evidence, and which was a mere summary of the evidence to guide the Commissioner in arriving at his decision.

It further appears from the record (pages 47 and 48) that the applicant was further represented by counsel

before the Department in Washington, who were permitted to see the entire record and make an oral argument before the Department.

The appellant attempts to lead this Honorable Court to believe that there is great difference between the procedure followed under the general Immigration Laws and that followed under the Chinese Exclusion Laws in arriving in a decision in the case of a person applying for admission to the United States, while as a matter of fact, there is but very little difference in the two procedures and no difference in the final results.

Under the Chinese Exclusion Laws, the Commissioner, who is the officer in charge and exercises a quasi judicial function passes upon the right of Chinese persons and persons of Chinese descent to enter the United States.

Under the general Immigration Laws the determination of the right of an alien to enter the United States, if denied by the individual inspector, is by law conferred upon a board of special inquiry. Under either procedure an appeal lies to the Secretary of Labor from an adverse decision.

Let us assume, for the sake of argument, that the case of Quan Hing Sun had been heard by a board of special inquiry, as provided under the Immigration Laws, and that the Board, after hearing all the testimony, had arrived at the same conclusion as the inspector who handled the case. The question of the

admission or rejection of the applicant would then be put to a vote; the member first voting to reject the alien should move his rejection on the grounds "that the claimed relationship had not been satisfactorily established and the further grounds that he was not admissible under Rule 9 of the Regulations, both parents then being dead." The next member would second this motion and the Chairman would make it unanimous.

This describes the method pursued in actual practice here by a Board of Special Inquiry in arriving at their decision and it does not, as appellant would lead this Court to believe, write any lengthy opinions or make any other findings than that described above.

It is further urged that the decision of the Secretary was based solely upon the objection that the relationship of the appellant to his alleged father had not been satisfactorily proven.

The memorandum opinion prepared by the Assistant Commissioner General (pages 49, 50 and 51, Exhibit "A"), which was approved by the Secretary of Labor, Honorable William B. Wilson, thereby adopting said opinion as his own, plainly shows that the only ground upon which the applicant was rejected was that of relationship.

That the objectionable features of Rule 9 had been abrogated before said opinion was handed down by the Secretary and that he was not influenced in arriving at

his opinion because of said rule, is shown by the following circular letter addressed to all Commissioners of Immigration and Inspectors in Charge:—

“DEPARTMENT OF LABOR
BUREAU OF IMMIGRATION
WASHINGTON.

54085/26

53884

May 9, 1916.

TO ALL COMMISSIONERS OF IMMIGRATION
AND INSPECTORS IN CHARGE:

In conformity with a recent opinion rendered by the Attorney General, on the questions whether Chinese born abroad to a Chinese father, the latter being an American citizen by birth, are citizens of the United States (a) during their minority, and (b) if they remain in China after attaining their majority—whether the provisions of Rule 9 of the Chinese Regulations as promulgated on October 15th, last, are a proper construction of the law, the Secretary now directs that said rule be amended in the following manner:

“Rule 9 of the Chinese Rules approved October 15th, is hereby amended by striking therefrom paragraphs (f) and (g), by changing the letter designation of the last paragraph thereof from (h) to (g), and by inserting a new paragraph designated (f), reading as follows: ‘(f) The lawful wife of an American citizen of the Chinese race may be admitted for the purpose of joining her husband, and the lawful children of such a citizen partake of his citizenship and are therefore entitled to

admission. In every such case convincing evidence of citizenship and relationship shall be exacted.' "

Signed: Alfred Hampton,
Asst. Commissioner-General.

WHEREFORE, appellee respectfully submits that this Honorable Court should order a rehearing of this case.

Dated, San Francisco, Cal.,
November 6, 1918.

Respectfully submitted,

ANNETTE ABBOTT ADAMS,
United States Attorney,

C. F. TRAMUTOLO,
Asst. United States Attorney,
Attorneys for Appellee.

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for appellee in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

ANNETTE ABBOTT ADAMS,
United States Attorney,

C. F. TRAMUTOLO,
Asst. United States Attorney,
Attorneys for Appellee.

IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT

THE R. R. THOMPSON ESTATE COMPANY,
a Corporation,

Plaintiff in Error,

vs.

LOUISE WEINHARD and ANNA WESSINGER,
PAUL WESSINGER and HENRY
WAGNER, Executrices and Executors, respectively,
of the Last Will and Testament of Henry
Weinhard, Deceased,

Defendants in Error.

In Error to the District Court of the United States for
the District of Oregon.

TRANSCRIPT OF RECORD

Filed

AUG 27 1911

F. D. Monckton,

Clerk.

No.

IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT

THE R. R. THOMPSON ESTATE COMPANY,
a Corporation,

Plaintiff in Error,

vs.

LOUISE WEINHARD and ANNA WESSINGER,
PAUL WESSINGER and HENRY
WAGNER, Executrices and Executors, respectively,
of the Last Will and Testament of Henry
Weinhard, Deceased,

Defendants in Error.

In Error to the District Court of the United States for
the District of Oregon.

TRANSCRIPT OF RECORD

IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT

THE R. R. THOMPSON ESTATE COMPANY,
a Corporation,

Plaintiff in Error,

vs.

LOUISE WEINHARD and ANNA WESSINGER,
PAUL WESSINGER and HENRY
WAGNER, Executrices and Executors, respectively, of the Last Will and Testament of Henry Weinhard, Deceased,

Defendants in Error.

Names and Addresses of Attorneys upon this Writ of
Error.

For Plaintiff in Error:

BAUER & GREENE and A. H. McCURTAIN,
Henry Building, Portland, Oregon.

For Defendants in Error

SIDNEY TEISER,
Morgan Building, Portland, Oregon
JULIUS SILVERSTONE,
Lumbermans' Building, Portland, Oregon.

INDEX

	Page
Amended Answer	20
Assignments of Error.....	54
Bond	60
Bill of Exceptions and Statement of Facts.....	65
Complaint	5
Citation on Writ of Error.....	63
Clerk's Certificate	144
Findings of Fact.....	38
Findings Proposed by Plaintiff in Error.....	41
Findings of Court.....	53
Judgment of Court.....	52
Motion to Vacate Judgment and for New Trial...	39
Opinion on Merits.....	33
Opinion of the Court.....	42
Order Vacating Judgment.....	49
Order Allowing Writ of Error.....	58
Order of Supersedeas.....	62
Order for Time to File Transcript.....	64
Petition for Writ of Error.....	53
Reply	25
Stipulation Waiving Jury Trial.....	32
Stipulation as to Transcript of Record.....	141
Writ of Error.....	59

BE IT REMEMBERED, that on the 2nd day of October, 1916, there was duly filed in the District Court of the United States for the District of Oregon, a Bill of Complaint in words and figures as follows, to-wit:

BILL OF COMPLAINT

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

LOUISE WEINHARD and ANNA WESSINGER, PAUL WESSINGER and HENRY WAGNER, Executrices and Executors, respectively, of the Last Will and Testament of Henry Weinhard, Deceased,

Plaintiffs,

vs.

THE R. R. THOMPSON ESTATE COMPANY, a Corporation,
Defendant.

COMPLAINT.

Comes now Louise Weinhard, Anna Wessinger, Paul Wessinger and Henry Wagner, executrices and executors, respectively, of the last will and testament of the estate of Henry Weinhard, deceased, plaintiffs, and for a first cause of action complain of The R. R.

Thompson Estate Company, a corporation, defendant, as follows, to-wit:

I.

That Louise Weinhard and Anna Wessinger, Paul Wessinger and Henry Wagner at all the times hereinafter mentioned were, and ever since have been, and now are, the executrics and executors, respectively, of the last will and testament of Henry Weinhard, deceased, duly appointed and qualified by the County Court of the State of Oregon for the County of Multnomah, in which said Court the estate of said Henry Weinhard, deceased, is in the course of probate and administration, and duly empowered to bring this action, and that all of them are citizens of the State of Oregon.

II.

That at all the times hereinafter mentioned The R. R. Thompson Estate Company was, ever since has been and now is a corporation, duly organized and existing under and by virtue of the laws of the State of California, and having its principal place of business therein, and that said corporation is a citizen of the State of California; that said corporation is carrying on business in the State of Oregon by an agent, and that said corporation, pursuant to the laws of the State of Oregon, has duly executed, acknowledged and filed a power of attorney in the office of the Secretary of State appointing a resident of the State of Oregon as its attorney in fact, authorized to accept service of all writs, processes and summons, and that the acting attorney in fact so ap-

pointed for said corporation is Henry W. Fries, a resident of Portland, Oregon.

III.

That on the 6th day of March, 1912, at Portland, Oregon, for value received, Multnomah Hotel Company, a corporation, Philip Gevurtz and I. Gevurtz & Sons, a corporation, the latter two being accommodation makers, made and delivered to the plaintiffs herein their promissory negotiable note, of which the following is a copy, to-wit:

\$4,500.00.

Portland, Ore., March 6, 1912.

On demand after date, without grace, we or either of us, promise to pay to the order of Louise Weinhard, Anna Wessinger, Paul Wessinger and Henry Wagner, Executrices and Executors respectively of the Last Will and Testament of Henry Weinhard, Deceased, at Portland, Oregon, Forty-five Hundred and no/100 Dollars, in Gold Coin of the United States of America, of the present standard value, with interest thereon in like Gold Coin at the rate of six per cent per annum from date until paid, for value received. Interest to be paid quarterly, and if not so paid, the whole sum of both principal and interest to become immediately due and collectible at the option of the holder of this note. And in case suit or action is instituted to collect this note, or any portion thereof, we or either of us promise and agree to pay, in addition to the costs and disbursements provided by statute, such additional sum, in like Gold

Coin, as the Court may adjudge reasonable, for attorney's fees to be allowed in said suit or action.

MULTNOMAH HOTEL CO.,

Philip Gevurtz, Pres.

PHILIP GEVURTZ.

I. GEVURTZ & SONS,

P. Gevurtz, Pres.

IV.

That demand has been made upon said Multnomah Hotel Company for the payment of said note on the 1st day of February, 1916, and at numerous times previous thereto, and that no part of said note has been paid except the sum of One Thousand Dollars (\$1,000.00), Five Hundred Dollars (\$500.00) of which was paid on the 4th day of May, 1914, and Five Hundred Dollars (\$500.00) of which was paid on the 6th day of October, 1914, and that there is now due and unpaid upon said note the principal sum of Thirty-five Hundred Dollars (\$3,500.00) with interest on Forty-five Hundred Dollars (\$4,500.00) thereof at the rate of six per cent (6%) per annum from the 6th day of March, 1912, to the 4th day of May, 1914; with interest on Four Thousand Dollars (\$4,000.00) thereof at the rate of six per cent (6%) per annum from the 4th day of May, 1914, until the 6th day of October, 1914, and with interest on Thirty-five Hundred Dollars thereof at the rate of six per cent (6%) per annum from the 6th day of October, 1914, until paid.

V.

That a reasonable attorney's fee for the preparation and prosecution of this action is Five Hundred Dollars (\$500.00).

VI.

That the Multnomah Hotel Company, one of the makers of said note, and who received the consideration for which the said note was given, was, at the making of said note and for a considerable time thereafter, the lessee and operator of the Hotel known as the Multnomah Hotel in the City of Portland, Oregon; that I. Gevurtz & Sons, a corporation, was, at the time of signing said note, the owner of a large majority, if not all, of the capital stock of said Multnomah Hotel Company; that Philip Gevurtz was, at the time of making said note, the president and one of the directors of the Multnomah Hotel Company, and an officer and director of said I. Gevurtz & Sons, Company, a corporation; and that The R. R. Thompson Estate Company, a corporation, defendant herein, was, at the time of making said note and for a considerable period thereafter, the owner and lessor of the property occupied by said Multnomah Hotel Company, a corporation, as a hotel, namely, the Multnomah Hotel.

VII.

That on or about the 1st day of January, 1913, and for a period of time anterior thereto, said I. Gevurtz & Sons, the holder of practically all of the capital stock of the Multnomah Hotel Company, was financially involved, and that likewise said Multnomah Hotel Com-

pany was heavily financially involved and owing large sums of money; and that at said time the said defendant, The R. R. Thompson Estate Company, owner and lessor of said Multnomah Hotel, in order to protect its property and for other reasons, offered to purchase, and did purchase, from said I. Gevurtz & Sons all of the capital stock of said Multnomah Hotel Company and agreed to pay therefor the sum of One Hundred Seventy-five Thousand Dollars (\$175,000.00). That said sum of \$175,000 was agreed to be held by the said The R. R. Thompson Estate Company and paid out by it to creditors of the said Multnomah Hotel Company, and the said The R. R. Thompson Estate Company agreed to assume the said debts of said corporation existing at the time of said purchase of said capital stock to the extent of \$175,000; and further agreed with the said I. Gevurtz & Sons that should said debts of said corporation exceed the sum of \$175,000 that said I. Gevurtz & Sons should discharge the same, or upon its immediate inability to do so that said The R. R. Thompson Estate Company, at its option, might advance the sum of Thirty-five Thousand Dollars (\$35,000.00) for the purpose of paying all the said debts of said Multnomah Hotel Company in excess of \$175,000, distributing said money on behalf of said Multnomah Hotel Company; and, further, should said debts exceed the said sum of \$175,000, and the sum of \$35,000 in addition, namely, the sum of \$210,000, then the said The R. R. Thompson Estate Company might assume, at its option, to pay debts of the Multnomah Hotel Company in excess of said \$210,000; and that upon the said The R. R. Thomp-

son Estate Company advancing said sums of money for the payment of said debts, or the assumption of said debts by said The R. R. Thompson Estate Company, the said I. Gevurtz & Sons should execute in favor of said The R. R. Thompson Estate Company a note in the amount of Thirty-five Thousand Dollars (\$35,000.00), and should also indemnify and hold harmless and reimburse the said The R. R. Thompson Estate Company for any and all sums of money paid and liabilities incurred for the debts paid or assumed of said Multnomah Hotel Company in excess of Two Hundred and Ten Thousand Dollars (\$210,000.00).

VIII.

That The R. R. Thompson Estate Company exercised its option to assume, and agreed to pay and assume all the debts of the Multnomah Hotel Company owing at the time of the said purchase of said capital stock in excess of \$175,000, and took from said I. Gevurtz & Sons said note and indemnity, heretofore mentioned in paragraph VII, and that said The R. R. Thompson Estate Company assumed the debts of said Multnomah Hotel Company owing the plaintiffs herein, which said debt was owing at the time of the purchase of said stock by said The R. R. Thompson Estate Company.

IX.

That on or about the 9th day of May, 1913, said I. Gevurtz & Sons were adjudged, by the District Court of the United States for the District of Oregon, bank-

rupt, and that said The R. R. Thompson Estate Company, defendant herein, in said proceedings in bankruptcy admitted its assumption of all of the debts of the said Multnomah Hotel Company owing by said company at the time of said purchase of the capital stock and its liability to pay the same, including that of the plaintiffs herein, and in said proceedings, on or about the 29th day of May, 1913, filed its claim against said I. Gevurtz & Sons, bankrupt, for the amount of debts of said Multnomah Hotel Company assumed or paid by it in excess of \$175,000.00, to-wit: in the amount of said note of \$35,000.00, and in the sum of \$24,439.42 in addition thereto; that the latter amount was claimed by reason of the agreement by I. Gevurtz & Sons to indemnify The R. R. Thompson Estate Company upon its payment or assumption of the alleged debts of the Multnomah Hotel Company in excess of \$210,000.00; and that the consideration for said note and for said agreement to indemnify, as set forth in said bankruptcy proceedings, was the payment or assumption of the said alleged indebtedness of said Multnomah Hotel Company in excess of \$175,000.00, which it, the defendant The R. R. Thompson Estate Company, had paid, or assumed, and among said indebtedness assumed was that of said plaintiffs as hereinbefore set forth.

X.

That in said bankruptcy proceedings of I. Gevurtz & Sons the said claim of The R. R. Thompson Estate Company was allowed as claimed, with the exception of \$2,933.38, and that said deduction of \$2,933.38 was

made by a stipulation of the said The R. R. Thompson Estate Company and the trustees of said bankrupt because of several disputed items, not involving the debt due said plaintiffs; and that said The R. R. Thompson Estate Company has received dividends in said bankruptcy proceedings upon its said claim as allowed.

XI.

That by reason of the premises aforesaid the said The R. R. Thompson Estate Company became and is indebted to the said plaintiffs herein in the sum of Thirty-five Hundred Dollars (\$3,500.00), with interest on Forty-five Hundred Dollars (\$4,500.00) at the rate of six per cent per annum from March 6, 1912, to the 4th day of May, 1914, and with interest upon Four Thousand Dollars (\$4,000.00) at the rate of six per cent per annum from the 4th day of May, 1914, to the 6th day of October, 1914, and with interest on Thirty-five Hundred Dollars (\$3,500.00) from the 6th day of October, 1914, until paid; and that demand has been made of said The R. R. Thompson Estate Company on or about the 15th day of April, 1916, for the payment of said debt, but that notwithstanding said demand payment thereof has not been made.

And for a second and further cause of action plaintiffs complain and allege as follows, to-wit:

I.

That Louise Weinhard and Anna Wessinger, Paul Wessinger and Henry Wagner at all times hereinafter

mentioned were, and ever since have been, and now are, the Executrices and Executors, respectively, of the Last Will and Testament of Henry Weinhard, deceased, duly appointed and qualified by the County Court of the State of Oregon for the County of Multnomah, in which said Court the estate of said Henry Weinhard, deceased, is in the course of probate and administration, and duly empowered to bring this action, and that all of them are citizens of the State of Oregon.

II.

That at all the times hereinafter mentioned The R. R. Thompson Estate Company was, ever since has been and now is a corporation, duly organized and existing under and by virtue of the laws of the State of California, and having its principal place of business therein, and that said corporation is carrying on business in the State of Oregon by an agent, and that said corporation, pursuant to the laws of the State of Oregon, has duly executed, acknowledged and filed a Power of Attorney in the office of the Secretary of State appointing a resident of the State of Oregon as its Attorney in Fact, authorized to accept service of all writs, processes and summonses, and that the acting Attorney in Fact so appointed for said corporation is Henry W. Fries, a resident of Portland, Oregon.

III.

That on the 6th day of March, 1912, at Portland, Oregon, for value received, Multnomah Hotel Com-

pany, a corporation, Philip Gevurtz & I. Gevurtz & Sons, a corporation, the latter two being accommodation makers, made and delivered to the plaintiffs herein their promissory negotiable note, of which the following is a copy, to-wit:

\$4,500.00.

Portland, Ore., March 6, 1912.

On demand after date, without grace, we or either of us, promise to pay to the order of Louise Weinhard, Anna Wessinger, Paul Wessinger and Henry Wagner, Executrices and Executors respectively of the Last Will and Testament of Henry Weinhard, Deceased, at Portland, Oregon, Forty-five Hundred and no/100 Dollars, in Gold Coin of the United States of America, of the present standard value, with interest thereon in like Gold Coin at the rate of six per cent per annum from date until paid, for value received. Interest to be paid quarterly, and if not so paid, the whole sum of both principal and interest to become immediately due and collectible at the option of the holder of this note. And in case suit or action is instituted to collect this note, or any portion thereof, we or either of us promise and agree to pay, in addition to the costs and disbursements provided by statute, such additional sum in like Gold Coin as the court may adjudge reasonable, for attorney's fees to be allowed in said suit or action.

MULTNOMAH HOTEL CO.,

Philip Gevurtz, Pres.

PHILIP GEVURTZ,

I. GEVURTZ & SONS,

P. Gevurtz, Pres.

IV.

That demand had been made upon said Multnomah Hotel Company for the payment of said note on the 1st day of February, 1916, and at numerous times previous thereto, and that no part of said note has been paid except the sum of One Thousand Dollars (\$1000.00) Five Hundred Dollars (\$500.00) of which was paid on the 4th day of May, 1914, and Five Hundred Dollars (\$500.00) of which was paid on the 6th day of October, 1914, and that there is now due and unpaid upon said note the principal sum of Thirty-five Hundred Dollars (\$3,500.00) with interest on Forty-five Hundred Dollars (\$4,500.00) thereof at the rate of Six per cent (6%) per annum from the 6th day of March, 1912, to the 4th day of May, 1914, with interest on Four Thousand Dollars (\$4,000.00) thereof at the rate of Six per cent (6%) per annum from the 4th day of May, 1914, until the 6th day of October, 1914, and with interest on Thirty-five Hundred Dollars thereof at the rate of Six per cent (6%) per annum from the 6th day of October, 1914, until paid.

V.

That a reasonable attorneys' fee for the preparation and prosecution of this action is Five Hundred Dollars (\$500.00).

VI.

That the Multnomah Hotel Company, one of the makers of said note, and who received the consideration for which the said note was given, was, at the making of

said note and for a considerable time thereafter, the lessee and operator of the hotel known as the Multnomah Hotel in the City of Portland, Oregon; that I. Gevurtz & Sons, a corporation, was, at the time of signing said note, the owner of a large majority, if not all, of the capital stock of said Multnomah Hotel Company; that Philip Gevurtz was, at the time of making said note, the President and one of the Directors of the Multnomah Hotel Company, and an officer and Director of said I. Gevurtz & Sons Company, a corporation; and that The R. R. Thompson Estate Company, a corporation, defendant herein, was, at the time of making said note and for a considerable period thereafter the owner and lessor of the property occupied by said Multnomah Hotel Company, a corporation, as a hotel, namely, the Multnomah Hotel.

VII.

That on or about the 1st day of January, 1913, and for a period of time anterior thereto, said I. Gevurtz & Sons, the holder of practically all of the capital stock of the Multnomah Hotel Company, was financially involved, and that likewise said Multnomah Hotel Company was heavily financially involved and owing large sums of money; and that at said time, the said defendant, The R. R. Thompson Estate Company, owner and lessor of said Multnomah Hotel, in order to protect its property and for other reasons, offered to purchase, and did purchase and receive from said I. Gevurtz & Sons all of the capital stock of said Multnomah Hotel Company and agreed to pay therefor the sum of One Hundred Seventy-five Thousand Dollars (\$175,000.00).

That said sum of \$175,000.00 was agreed to be held by the said The R. R. Thompson Estate Company and paid out by it to the existing creditors of the said Multnomah Hotel Company, and the said The R. R. Thompson Estate Company thereupon and then agreed to assume the said debts of said corporation then existant to the extent of \$175,000.00, and that the said Multnomah Hotel Company then owed to said plaintiffs the debt which is the subject of this action.

VIII.

That the debts for which the Multnomah Hotel Company was liable at said time, including that of plaintiffs herein, did not amount to the sum of \$175,000.00.

IX.

That by reason of the premises aforesaid the said The R. R. Thompson Estate Company became, was and is indebted to the said plaintiffs herein in the principal sum of \$3,500.00, with interest on \$4,500.00 at the rate of six per cent per annum from the 6th day of March, 1912, to the 4th day of May, 1914; with interest on \$4,000.00 at the rate of six per cent per annum from the 4th day of May, 1914, until the 6th day of October, 1914, and with interest on \$3,500.00 at the rate of six per cent per annum from the 6th day of October, 1914, until paid, and that on or about the 15th day of April, 1916, demand was made upon The R. R. Thompson Estate Company for the payment of said debt, but that notwithstanding said demand payment thereof has not been made.

WHEREFORE, Plaintiffs pray that they may be awarded judgment against said defendant in the amount of \$3,500.00, with interest on \$4,500.00 at the rate of six per cent per annum from the 6th day of March, 1912, to the 4th day of May, 1914; with interest on \$4,000.00 at the rate of six per cent per annum from the 4th day of May, 1914, until the 6th day of October, 1914, and with interest on \$3,500.00 at the rate of six per cent per annum from the 6th day of October, 1914, until paid; together with the sum of \$500.00, reasonable attorneys' fee herein; and the costs and disbursements in this action.

JULIUS SILVESTONE,

SIDNEY TEISER,

Attorneys for Plaintiffs.

UNITED STATES OF AMERICA,

Dist. and State of Oregon,

County of Multnomah,—ss.

Comes now, Henry Wagner, one of the executors of the last Will and Testament of Henry Weinhard, deceased, one of plaintiffs herein, who upon being duly sworn deposes and says, that I have read the foregoing complaint, that the facts set forth therein are true to the best of my information and belief.

HENRY WAGNER.

Subscribed and sworn to before me this 2nd day of October, 1916.

L. H. HAMIG,

Notary Public for Oregon.

My commission expires September 21, 1920.

(Notarial Seal)

(Endorsed) Filed Oct. 2, 1916.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 14th day of December, 1916, there was duly filed in said court and cause an Amended Answer (omitting title and formal parts) in words and figures as follows, to-wit:

AMENDED ANSWER

Now comes the defendant, and for answer to plaintiff's complaint admits, denies and alleges as follows:

I.

Admits paragraphs I and II of said complaint.

II.

Denies that it has any knowledge or information sufficient to form a belief as to any of the matters and things alleged in paragraph III of said complaint, and therefore denies the same.

III.

Denies paragraphs IV and V of said complaint.

IV.

Admits that the Multnomah Hotel Company was the lessee and operator of the hotel known as the Multnomah Hotel in the City of Portland, Oregon; that I.

Gevurtz & Sons, a corporation, was the owner of a large majority, if not all, of the capital stock of said company; that Philip Gevurtz was at the time of making said alleged note, the president and one of the directors of said Multnomah Hotel Company, and an officer and director of said I. Gevurtz & Sons, a corporation; that defendant was then and for a considerable period thereafter, the owner and lessor of the property occupied by said Multnomah Hotel Company. Denies all allegations of paragraph VI of said complaint not herein expressly admitted.

V.

Admits that on or about the 1st day of January, 1913, and for some time prior thereto, I. Gevurtz & Sons, a corporation, was the holder of practically all of the capital stock of the Multnomah Hotel Company. Denies all allegations of paragraph VII of said complaint not herein expressly admitted.

VI.

Denies paragraph VIII of said complaint.

VII.

Admits that on or about the 9th day of May, 1913, I. Gevurtz & Sons was adjudged a bankrupt by the United States District Court for the District of Oregon, but denies all other allegations contained in paragraph IX of said complaint.

VIII.

Denies paragraphs X and XI of said complaint.

And for answer to plaintiff's second and further cause of action defendant admits, denies and alleges as follows:

I.

Admits paragraphs I and II thereof.

II.

Denies that it has any knowledge or information sufficient to form a belief as to any of the matters and things alleged in paragraph III of said complaint, and therefore denies the same.

III.

Denies paragraphs IV and V of said complaint.

IV.

Admits that the Multnomah Hotel Company at the time of the making of said alleged note, and for a considerable time thereafter was the lessee and operator of the hotel known as the Multnomah Hotel in the City of Portland, Oregon; that I. Gevurtz & Sons, a corporation, was at said time the owner of a large majority, if not all, of the capital stock of said Multnomah Hotel Company; that Philip Gevurtz was at said time the president and one of the directors of the Multnomah Hotel Company, and an officer and director

of said I. Gevurtz & Sons; that defendant for a considerable time thereafter was the owner and lessor of the property occupied by said Multnomah Hotel. Denies all allegations contained in paragraph VI of said further and separate cause of action not herein expressly admitted.

V.

Admits that on or about the 1st day of January, 1913, and for a period of time prior thereto, said I. Gevurtz & Sons was the owner of practically all of the capital stock of the Multnomah Hotel Company; that at said time defendant was the owner and lessor of said Multnomah Hotel. Denies all other allegations contained in paragraph VII of said further and separate cause of action.

VI.

Denies paragraph VIII of said further and separate cause of action, and alleges that at said time the debts of said Multnomah Hotel Company, including the alleged debt of plaintiff herein, amounted to more than \$210,000.00.

VII.

Denies paragraph IX of said further and separate cause of action.

And for a further and separate defense to plaintiff's first cause of action defendant alleges:

I.

That the Multnomah Hotel Company was and is a corporation duly organized and existing under and

by virtue of the laws of the State of Oregon, with its principal office and place of business in Portland, Oregon; that as such corporation it duly adopted certain by-laws at the time of its organization, which have ever since been and still are in full force and effect; that in and by said by-laws it was and is provided that all the promissory notes and obligations of said corporation should be signed jointly by its president and treasurer; that Philip Gevurtz, the president of said Multnomah Hotel Company had no authority to make, execute or deliver the promissory note set out in the first cause of action stated in plaintiff's complaint, or any note of said corporation, without the joint signature of its treasurer.

For answer to the second cause of action set out in plaintiff's complaint, defendant alleges:

I.

That the Multnomah Hotel Company was and is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, with its principal office and place of business in Portland, Oregon; that as such corporation it duly adopted certain by-laws at the time of its organization, which have ever since been and now are in full force and effect; that in and by said by-laws it was and is provided that all the promissory notes and obligations of said corporation should be signed jointly by its president and treasurer; that Philip Gevurtz, the president of said Multnomah Hotel Company, had no authority to make, execute or deliver the note set out in plaintiff's second

cause of action, or any note of said corporation, without the joint signature of its treasurer.

WHEREFORE, Defendant prays for judgment against the plaintiffs for its costs and disbursements herein.

BAUER & GREENE and
A. H. McCURTAIN,
Attorneys for Defendant.

(Endorsed) Filed Dec. 14, 1916.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 20th day of December, 1916, there was duly filed in said court and cause a Reply (omitting title and formal parts) in words and figures as follows, to-wit:

REPLY

Come now plaintiffs above named, and for reply to defendant's further and separate defense to plaintiffs' first cause of action, contained in the amended answer filed by said defendant, reply and say:

I.

That they have not sufficient information on which to form a belief as to the correctness of the allegations contained in paragraph I of said further and separate defense to the effect that the Multnomah Hotel Company, a corporation, duly adopted certain by-laws at the time of its organization, which have ever since been and still are in full force and effect, and that in and by

said by-laws it was and is provided that all of the promissory notes and obligations of said corporation should be signed jointly by its President and Treasurer, and therefore deny said allegations; and further deny that Philip Gevurtz, the President of the said Multnomah Hotel Company had no authority to make, execute or deliver the promissory note set out in the first cause of action stated in plaintiffs' complaint, or any note of said corporation without the joint signature of its treasurer.

And as a further reply to defendant's further and separate defense to plaintiffs' first cause of action, plaintiffs allege and reply as follows:

I.

That at the time of the making, executing and delivering of said promissory note, set out in plaintiffs' complaint, by Philip Gevurtz, President of said Multnomah Hotel Company, on behalf of said Multnomah Hotel Company, a corporation, the said Multnomah Hotel Company received the consideration for said note, to-wit: Forty-five Hundred (\$4500) Dollars in cash; that it accepted said consideration and thereafter used said money for its own purposes, and received the benefits thereof; and was estopped from setting up the alleged absence of authority of the officer making, executing and delivering said note, and that said alleged defense, not being available to it, is not available to said defendant.

And as a second and further reply to defendant's

further and separate answer and defense to plaintiffs' first cause of action, plaintiffs reply and say:

I.

That subsequent to the making, executing and delivering of said note and of receiving the consideration therefor, said Multnomah Hotel Company, a corporation, ratified the action of said Philip Gevurtz, President, in making, executing and delivering said note.

And as a third and further reply to defendant's further and separate answer and defense to plaintiffs' first cause of action, plaintiffs reply and allege as follows:

I.

That in the bankruptcy proceedings of I. Gevurtz & Sons, instituted in the District Court of the United States for the District of Oregon, the defendant filed, on or about the 29th day of May, 1913, a proof of claim, wherein it alleged that it had assumed to pay, amongst other debts, the said note set forth in plaintiffs' complaint; that based on said allegation in said proof of claim, the said claim was allowed by the referee in bankruptcy in said proceedings, and that the said defendant received and accepted, and retained the benefits of, dividends in said proceedings, and that thereby it is estopped from setting up the alleged invalidity of said note.

And for a fourth and further reply to defendant's further and separate answer and defense to plaintiffs'

first cause of action, plaintiffs reply and allege as follows:

I.

That in the bankruptcy proceedings of J. Gevurtz & Sons, instituted in the District Court of the United States for the District of Oregon, the said defendant, on or about the 29th day of May, 1913, filed a proof of claim in said proceedings wherein it alleged its liability for the payment of the note set forth in plaintiffs' complaint, and upon its representation in that regard made, its claim, based on said liability, was allowed; and that the said defendant thereafter received and retained dividends upon said claim so claimed and allowed as aforesaid, and that thereby the said defendant is estopped of record from setting up the alleged want of authority of the President of said Multnomah Hotel Company, a corporation, to execute the said note on behalf of the said corporation, or to otherwise attack the validity of said note.

And as a reply to defendant's further and separate defense to plaintiffs' second cause of action, plaintiffs reply and say:

I.

That they have not sufficient information on which to form a belief as to the correctness of the allegations contained in paragraph I of said further and separate defense to the effect that the Multnomah Hotel Company, a corporation, duly adopted certain by-laws at the time of its organization which have ever since been

and still are in full force and effect, and that in and by said by-laws it was and is provided that all of the promissory notes and obligations of said corporation should be signed jointly by its President and Treasurer, and therefore deny said allegations, and further deny that Philip Gevurtz, the President of the said Multnomah Hotel Company had no authority to make, execute or deliver the promissory note set out in the first cause of action stated in plaintiffs' complaint, or any note of said corporation without the joint signature of its treasurer.

And as a further reply to defendant's further and separate defense to plaintiffs' second cause of action, plaintiffs allege and reply as follows:

I.

That at the time of the making, executing and delivering of said promissory note, set out in plaintiffs' complaint, by Philip Gevurtz, President of said Multnomah Hotel Company, on behalf of said Multnomah Hotel Company, a corporation, the said Multnomah Hotel Company received the consideration for said note, to-wit: Forty-five Hundred (\$4500) Dollars in cash; that it accepted said consideration and thereafter used said money for its own purposes and received the benefits thereof, and was estopped from setting up the alleged absence of authority of the officer making, executing and delivering said note, and that said alleged defense, not being available to it, is not available to said defendant.

And as a second and further reply to defendant's further and separate answer and defense to plaintiffs' second cause of action, plaintiffs reply and say:

I.

That subsequent to the making, executing and delivering of said note and of receiving the consideration therefor, said Multnomah Hotel Company, a corporation, ratified the action of said Philip Gevurtz, President, in making, executing and delivering said note.

And as a third and further reply to defendant's further and separate answer and defense to plaintiffs' second cause of action, plaintiffs reply and allege as follows:

I.

That in the bankruptcy proceedings of I. Gevurtz & Sons, instituted in the District Court of the United States for the District of Oregon, the defendant filed, on or about the 29th day of May, 1913, a proof of claim, wherein it alleged that it had assumed to pay, amongst other debts, the said note set forth in plaintiffs' complaint; that based on said allegations in said proof of claim, the said claim was allowed by the referee in bankruptcy in said proceedings, and that the said defendant received and accepted, and retained the benefits of, dividends in said proceedings, and that thereby it is estopped from setting up the alleged invalidity of said note.

And for a fourth and further reply to defendant's further and separate answer and defense to plaintiffs'

second cause of action, plaintiffs reply and allege as follows:

I.

That in the bankruptcy proceedings of I. Gevurtz & Sons, instituted in the District Court of the United States for the District of Oregon, the said defendant, on or about the 29th day of May, 1913, filed a proof of claim in said proceedings, wherein it alleged its liability for the payment of the note set forth in plaintiffs' complaint, and upon its representation in that regard made, its claim, based on said liability, was allowed; and that the said defendant thereafter received and retained dividends upon said claim so claimed and allowed as aforesaid, and that thereby the said defendant is estopped of record from setting up the alleged want of authority of the President of said Multnomah Hotel Company, a corporation, to execute the said note on behalf of the said corporation, or to otherwise attack the validity of said note.

WHEREFORE, Plaintiffs pray for judgment against said defendant as set forth in its complaint.

(Signed) JULIUS SILVERSTONE

(Signed) SIDNEY TEISER.

Of Attorneys for Plaintiffs.

(Endorsed) Filed Dec. 20, 1916.

G. H. MARSH, Clerk.

That thereafter, to-wit, on the 1st day of March, 1917, there was duly filed in said court and cause a Stip-

ulation in words and figures as follows (omitting title and formal parts) to-wit:

STIPULATION WAIVING JURY TRIAL

This stipulation entered into this 1st day of March, 1917, by and between plaintiffs and defendant, through their respective counsels.

WITNESSETH: That whereas, stipulation has heretofore been entered into, in open court, at the time the above entitled cause was set for trial by and between counsel for plaintiff and counsel for defendant, whereby trial by jury was waived and whereby said cause was set as a cause to be heard without jury and it appearing that the requirements of law necessitates a waiver in writing of trial by jury.

NOW, THEREFORE, trial by jury of the issues in the above entitled cause be and the same is hereby waived, and the parties hereby consent to a trial of said cause by the court without jury.

SIDNEY TEISER,

Of Attorneys for Plaintiffs.

CECIL H. BAUER,

Of Attorneys for Defendant.

° (Endorsed) Filed March 1, 1917.

G. H. MARSH, Clerk.

That thereafter, to-wit, on the 21st day of May, 1917, there was duly filed in said court and cause an Opinion on the Merits which (omitting title and formal parts) is in words and figures as follows, to-wit:

OPINION ON THE MERITS

The plaintiffs bring this action to recover against the defendant upon a promissory note executed by the Multnomah Hotel Company, Philip Gevurtz and I. Gevurtz & Sons, of which the Hotel Company is principal and the other two are accommodation makers. I. Gevurtz & Sons is a corporation. At the time of the execution of the note and the transactions now to be noticed, the defendant corporation was the owner of the Multnomah Hotel in Portland, Oregon, and the Multnomah Hotel Company was a lessee of the hotel from it. I. Gevurtz & Sons was the owner of all the common stock and all but 50 shares of the preferred stock of the Multnomah Hotel Company, and on January 10, 1913, gave to the defendant an option to purchase all the common and preferred stock of the company at the price of \$175,000. This option ripened into an agreement between the parties, whereby I. Gevurtz & Sons sold to the R. R. Thompson Estate Company all the common and preferred stock of the Multnomah Hotel Company at the figure named in the option. In such sale it was agreed that the defendant company should have the right, in paying the \$175,000, to apply the same towards the payment of the indebtedness of the Hotel Company, and it was further agreed, in effect, that the defendant company would advance to I. Gevurtz & Sons the further sum of \$35,000 on its promissory note, the same to be also applied in discharge of the Hotel Company's indebtedness and liabilities, and in addition that I. Gevurtz & Sons would guarantee, indemnify, and save harmless the defendant

company against the payment of any further debts and liabilities of the Hotel Company, over and beyond the aggregate of the consideration price to be paid for said stock and the \$35,000 to be advanced; the purpose being, as expressed by the option, that the defendant company should obtain good title to the property and assets of the Hotel Company free and clear of all claims, liabilities, and indebtedness, of whatever character or nature. The note and guaranty were given, and the defendant company disbursed the funds which it retained in its hands, namely, the \$175,000 consideration and the \$35,000, towards the payment of the liabilities of the Hotel Company, and paid liabilities largely beyond these sums in pursuance of the guaranty, but has refused to pay the demand of the plaintiffs on the promissory note of the Hotel Company and its accommodation makers.

The defendant company having answered, the cause was submitted to the court without the interposition of a jury.

At the trial it was shown that I. Gevurtz & Sons had been adjudged a bankrupt, and that the defendant company presented a claim against the estate of the bankrupt, which was held by the referee to be provable, which comprised the entire liabilities of the Hotel Company, including the demand of the plaintiffs on the note here sued upon, basing its claim upon the promissory note of I. Gevurtz & Sons for \$35,000, the agreement of sale of the common and preferred stock of the Hotel Company, and the guaranty and indemnity by I. Gevurtz & Sons against the payment of any and

all indebtedness and liability of the Hotel Company. Further than this, the defendant has received from the trustee of the estate of I. Gevurtz & Sons a dividend of 23 per cent upon all such indebtedness, including the claim which plaintiffs are now suing to recover.

The questions are presented, first, whether the defendant company assumed the payment of the indebtedness or liabilities of the Hotel Company; and, second, whether the defendant company, through and by virtue of its transactions with I. Gevurtz & Sons, rendered itself liable directly to the creditors of the Hotel Company, they being third or outside parties to the dealings between the defendant company and I. Gevurtz & Sons.

On the first question, counsel for the defendant company say that:

"The option, the resolutions of the stockholders and directors of I. Gevurtz & Sons, and the written indemnity all negative the proposition that there was an assumption of the debts of creditors of I. Gevurtz & Sons by the Thompson Estate Co. in excess of the purchase price for the stock, namely, \$175,000."

This is an admission that the defendant company did assume the debts of such creditors up to the amount of \$175,000. But, considering the manner in which the transactions were handled, it is manifest that there was an assumption of the entire indebtedness of the Hotel Company. The purpose of the defendant company, and such was the intendment of the agreement of the parties, was to obtain the stock without impairment

of its value because of any impending liabilities of the Hotel Company, and when the note of \$35,000 was given, the defendant company retained in its possession the fund arising therefrom, and disbursed it in payment of the creditors of the Hotel Company. None of it was paid directly to I. Gevurtz & Sons. And as to the indemnity, it operated to reimburse the defendant company in the payment of any liabilities of the Hotel Company beyond the aforesaid amount of \$175,000 plus the \$35,000 disbursed by the defendant company. I am impressed that these transactions import by implication an assumption on the part of the defendant company of the liabilities of the Hotel Company, not only up to the amount of \$175,000, but also of all its liabilities beyond that amount.

It is very true, as counsel for defendant contends, that where there is only an executory contract entered into between two parties, whereby one of the parties for a consideration moving from the other agrees to pay the debt of a third, the third party has no right of action against the promisor. *Washburn v. Investment Company*, 26 Or. 436; *Brower Lumber Co. v. Miller*, 28 Or. 565.

But it is settled law now in this state that, where a person has received from another some fund, property or thing, in consideration of which he has made a promise or entered into an undertaking with such other, but primarily and directly for the benefit of a third, such third party may maintain an action directly upon such promise or undertaking so made and en-

tered into for his benefit, although not a party to the transaction.

"In such case," as was said in *Feldman v. McGuire*, 34 Or. 309, "the third party acquires an equitable interest in the property, fund, or thing; and the law, acting upon the relationship of the parties and their treatment of the fund, establishes the requisite privity, creates a duty, and implies a promise which will support the action."

The doctrine has been treated of as well in the two cases first above cited, and in *Parker v. Jeffery*, 26 Or. 186, and *Kiernan v. Kratz*, 42 Or. 474, and there has been no modification of it that I am aware of in recent years.

Applying the principle here, there was in legal intendment a fund created and left in the hands of the defendant company for the payment of all the liabilities of the Hotel Company, and for that reason the defendant company was rendered liable directly to all the creditors of the Hotel Company, including the plaintiffs. Nor is the undertaking or promise thus implied within the statute of frauds. *Feldman v. McGuire*, *supra*.

(Endorsed) Filed May 21, 1917.

G. H. MARSH, Clerk.

That thereafter, to-wit, on May 21, 1917, there was duly filed in said court and cause Findings of Fact which (omitting title and formal parts) are in words and figures as follows, to-wit:

FINDINGS OF FACT.

This cause coming on to be heard, before the court without the intervention of a jury, and the court having heard the testimony and the argument of counsel, and now being sufficiently advised in the premises, finds for the plaintiffs in the sum of \$4736.38, and the further sum of \$475.00 as a reasonable attorney's fee.

(Signed) CHAS. E. WOLVERTON,

Judge.

(Endorsed) Filed May 21, 1917.

G. H. MARSH, Clerk.

That thereafter, to-wit, on May 21, 1917, there was duly filed in said court and cause a Judgment Order which (omitting title and formal parts) is in words and figures as follows, to-wit:

JUDGMENT ORDER

May 21st, 1917.

This cause was tried before the Court without the intervention of a jury upon the proceedings and the proofs; plaintiff appearing before Mr. Sidney Teiser and Mr. Julius Silverstone of counsel and defendant appearing before Mr. Cecil Bauer and Mr. A. H. McCurtain of counsel, and the court being fully advised in the premises now files therein its findings of fact in words and figures as follows, to-wit:

“This cause coming on to be heard before the Court without the intervention of a jury and the Court having heard the testimony and the argument of counsel, and

now being sufficiently advised in the premises finds for the plaintiffs in the sum of Forty-seven Hundred Thirty-six and 38/100ths Dollars and the further sum of Four Hundred Seventy-five and 00/100ths Dollars as a reasonable attorney's fee.

CHAS. E. WOLVERTON,

Judge.

WHEREUPON IT IS ADJUDGED that said plaintiff do, have and recover of and from said defendant the sum of Forty-seven Hundred Thirty-six and 38/100ths Dollars and the further sum of Four Hundred Seventy-five and 00/100ths Dollars as a reasonable attorney's fee and their costs and disbursements therein taxed in the sum of \$. and their execution issued therefor.

(Endorsed) Filed May 21, 1917.

G. H. MARSH, Clerk.

That thereafter, to-wit, on the 8th day of June, 1917, there was duly filed in said court and cause Motion to Vacate Judgment and for a New Trial which (omitting title and formal parts) is in words and figures as follows, to-wit:

MOTION TO VACATE JUDGMENT AND FOR A NEW TRIAL

Comes now the defendant by its attorneys, and moves the court for an order vacating and setting aside the general findings and the judgment heretofore made and

entered herein for a new trial and a re-hearing, and assigns as the grounds thereof the following:

I.

That the court erred in its finding to the effect that there was an assumption of the entire indebtedness of the Multnomah Hotel Company by the defendant company, or any indebtedness in excess of the sum of \$175,000.00.

II.

That the court erred in its finding to the effect that the transactions between the Multnomah Hotel Company and the defendant company imported by implication an assumption of the liabilities of the Multnomah Hotel Company by the defendant company in excess of \$175,000.00.

III.

That the court erred in its conclusion to the effect that there was in legal intendment a fund created and left in the hands of the defendant company for the payment of liabilities of the Multnomah Hotel Company, or any liabilities in excess of the sum of \$175,000.00.

IV.

That the court erred in its conclusion that the undertaking of the defendant was not within the Statute of Frauds.

V.

That the court erred in its finding and conclusion to the effect that the plaintiff is entitled to a judgment, and in not finding that the defendant was entitled to a judgment.

**BAUER & GREENE and
A. H. McCURTAIN,**
Attorneys for Defendant.

(Endorsed) Filed June 8, 1917.

G. H. MARSH, Clerk.

That thereafter, to-wit, on the 11th day of June, 1917, there was duly filed in said court and cause Findings of Fact Proposed by Plaintiff in Error which (omitting title and formal parts) are in words and figures as follows, to-wit:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PROPOSED BY PLAINTIFF IN ERROR

The defendant respectfully requests the court to make, file and enter the following Findings of Fact and Conclusions of Law in the above styled cause:

FINDINGS OF FACT.

I.

That on or about the 10th day of January, 1913, I. Gevurtz & Sons, a corporation, being the owners of all of the common capital stock of Multnomah Hotel

Company, a corporation, by an instrument in writing, gave an option to the defendant corporation for the purchase of all of the stock of said Multnomah Hotel Company for the sum of \$175,000.00 in cash, which said option further provided that the said defendant company should have the right in paying said \$175,000.00 to apply the same towards the payment of the indebtedness of said Multnomah Hotel Company to the First National Bank of Portland, Oregon, and to all other creditors of said company, to the extent of said sum of \$175,000.00, and any and all other indebtedness or liabilities of said Multnomah Hotel Company up to the date of the transfer of said stock was to be paid by said I. Gevurtz & Sons, and which option further provided that if said I. Gevurtz & Sons should not be in position to pay the said indebtedness as the same became due, the said defendant company would advance necessary moneys to pay and discharge same for said I. Gevurtz & Sons upon the execution of its promissory note to the defendant company for all of said sums of money so required, provided, however, that said amounts shall not exceed in the aggregate the sum of \$35,000.00, and provided, further, that said I. Gevurtz & Sons should warrant and guarantee the said defendant company against any and all indebtedness and liabilities of said Multnomah Hotel over and above the aggregate amounts of \$175,000.00, the consideration of the purchase price of said stock, and \$35,000.00 to be advanced by it, the defendant company, to said I. Gevurtz & Sons to entitle it to pay and liquidate the obligations of said hotel in excess of the purchase price

of the stock, and said contract further provided that it was the intention that in selling all of the common and preferred stock of the Multnomah Hotel Company to said defendant company, for the sum of \$175,000.00, as aforesaid, the said The R. R. Thompson Estate Company should thereby obtain good title to all of the property and assets of the Multnomah Hotel Company, free and clear of all claims, demands, liabilities, liens or indebtedness of any character or nature whatsoever, and that any and all other such debts, liabilities, liens or indebtedness should be assumed and paid by said I. Gevurtz & Sons, and that the advance by the defendant company of the additional sum of \$35,000.00 should be only as a matter of accommodation to I. Gevurtz & Sons, and should not be any acknowledgment of any assumption by said defendant company of any further liabilities, or for the payment of any greater sum for the assets of the Multnomah Hotel Company than represented by the purchase price of said common and preferred stock.

II.

That subsequent to the giving of the option as set forth in finding No. 1, the said option ripened into an agreement between the parties, and said I. Gevurtz & Sons transferred and delivered to the defendant company all of the common and preferred stock of the Multnomah Hotel Company, in accordance with the terms of said option, and that thereafter the defendant company paid to the creditors of said Multnomah Hotel Company the sum of \$175,000.00, and in addition thereto paid to the creditors of the Multnomah Hotel Com-

pany the sum of \$35,000.00, and took from I. Gevurtz & Sons, a corporation, its promissory note in the sum of \$35,000.00, to cover said advances, and that thereafter said defendant company paid divers other creditors of the Multnomah Hotel Company, but refused to pay the claim of the plaintiff herein.

III.

That there was no contract or memorandum in writing, signed by the defendant company, whereby the defendant company agreed to pay any indebtedness of the Multnomah Hotel Company.

IV.

That on the 16th day of February, 1913, the said I. Gevurtz & Sons duly made, executed and delivered to the defendant company its contract in writing, by the terms of which it was provided that it, the said I. Gevurtz & Sons, would indemnify and save the defendant company, and its successors and assigns, free and harmless against any and all indebtedness and liabilities of the Multnomah Hotel Company and against all claims or demands, actions, damages, liabilities, suits, fines, liens and contracts of indebtedness of any character whatsoever, either due to I. Gevurtz & Sons directly or indirectly, or to any other person, firm or corporation arising out of or incurred in the operation of said Multnomah Hotel Company from the time of its beginning to the date of the delivery of possession of all its common and preferred stock by I. Gevurtz & Sons to the defendant company, over and above the

sum of \$210,000.00, being the aggregate amount of the purchase price of said common and preferred stock, to-wit: \$175,000.00, and the amount of \$35,000.00 advanced and loaned by said defendant company to said I. Gevurtz & Sons, and by which contract the said I. Gevurtz & Sons bound itself to pay any and all indebtedness or liabilities which might remain unpaid or be in excess of the amount of \$210,000.00, to be applied as in said contract provided.

V.

That on or about the 9th day of May, 1913, said I. Gevurtz & Sons was adjudged a bankrupt, and the defendant company presented a claim against the estate of said bankrupt, which was held to be provable by the referee, which comprised the entire liabilities of the Multnomah Hotel Company, including the demands of the plaintiff on the note herein sued upon, the said defendant basing its claim in said bankruptcy proceedings upon the promissory note of I. Gevurtz & Sons for \$35,000.00, the agreement of sale of the common and preferred stock of Multnomah Hotel Company and the guaranty and indemnity by I. Gevurtz & Sons against the payment of any and all indebtedness and liabilities of the Multnomah Hotel Company, the said claim having been allowed, the defendant received a dividend from the trustee of the estate of I. Gevurtz & Sons, in bankruptcy, of 23% of all such indebtedness, including the claim which plaintiffs are now seeking to recover.

VI.

That subsequent to date of the payments of said dividends as set forth in finding numbered V, the Multnomah Hotel Company paid to the plaintiff on account of the note here sued upon, \$1000.00.

VII.

Subsequent to the bankruptcy of I. Gevurtz & Sons the Multnomah Hotel Company continued in business for a period of approximately thirty-two months, during which time the plaintiff herein made no attempt to collect its note against the said Hotel Company, and on or about the 26th day of January, 1916, the Multnomah Hotel Company was adjudged a bankrupt.

From the foregoing Findings of Fact the court finds and makes the following Conclusions of Law:

CONCLUSIONS OF LAW.

I.

That the defendant company did not assume any of the liabilities of the Multnomah Hotel Company, or agree to pay the same in excess of the sum of \$175,000.00.

II.

That there was no fund created in the hands of the defendant company for the payment of the liabilities of the Multnomah Hotel Company in excess of the sum of \$210,000.00.

III.

That there was no memorandum or other contract in writing, signed by the defendant company, undertaking or agreeing to pay any of the indebtedness of the Multnomah Hotel Company, and that any assumption or promise made by the defendant company is unenforceable at law because coming within the Statute of Frauds.

IV.

That the plaintiff cannot maintain its action against the defendant company, and the defendant company is entitled to a judgment dismissing the plaintiff's complaint, and for its costs and disbursements.

.....
Judge.

(Endorsed) Filed June 11, 1917.

G. H. MARSH, Clerk.

That thereafter, to-wit, on the 11th day of June, 1917, the court made and rendered its Opinion herein which (omitting title and formal parts) is in words and figures as follows, to-wit:

OPINION OF THE COURT

Julius Silverstone and Sidney Teiser for Plaintiffs.
Bauer & Greene and A. H. McCurtain for Defendant.

WOLVERTON, District Judge: (Orally)

There are two cases bearing upon this subject, which I have examined, and one is the case cited by counsel this morning—*Humphreys v. Third National Bank of Cincinnati, Ohio*, found in 75 Federal at page 852. That is a case in the Circuit Court of Appeals for the Sixth Circuit. In that case Judge Taft intimates that the practice has resulted in a sort of trap to catch the unwary, although upon consultation of the decisions of the Supreme Court of the United States every lawyer ought to be advised of the practice.

Of course, it is my purpose to avoid entrapping counsel or the parties into a situation that would prevent them from presenting their case in full in the Court of Appeals.

Now, there are two ways of raising the questions which it is proposed to raise in this case. The question that is desired to be raised primarily is whether or not the testimony in the case supports the verdict. That is the effect of it. One way of raising that question is, as pointed out by Judge Taft in his opinion, by request to the court to direct a verdict on the ground of insufficiency of the evidence. That is a motion that is often made when a jury is called and the trial is before a jury, and it is a motion that could have been made in this case; and I do not think that the court at this time would be warranted in setting aside this verdict for the purpose of allowing that motion to be made. The other manner in which the question might be raised is by presenting to the court findings, and then the court may pass upon those findings. If the court refuses

to make the findings, then that may be reserved by exception, and that would raise the entire question.

I rather think in this case, in order that the matter may be fully presented, that the verdict should be set aside, and the court will refuse these findings which have been tendered, and then the court will make the same general findings as it made before, and the judgment may be entered as of this date. The clerk will make a copy of those findings, so that I can sign them, the general findings, and that will make up the record of the court.

(Endorsed) Filed June 11, 1917.

G. H. MARSH, Clerk.

That thereafter, to-wit, on the 11th day of June, 1917, there was duly filed in said court and cause an Order which (omitting title and formal parts) is in words and figures as follows, to-wit:

ORDER VACATING JUDGMENT

This cause came on regularly to be heard this 11th day of June, 1917, on motion of defendant for an order vacating and setting aside the general Findings and the Judgment heretofore made and entered herein and for a new trial and rehearing, plaintiff appearing by Sidney Teiser of counsel, and the defendant by Thomas G. Greene of counsel, and the court having considered the said motion and being fully advised in the premises; and it appearing to the court that said motion should be allowed for the purpose of affording said defendant an opportunity to present proposed special Findings of

Fact and Conclusions of Law, and for the further purpose of permitting defendant, should the court fail or refuse to sign the proposed special Findings of Fact and Conclusions of Law as prayed, to request special Findings in conformity with the general Verdict or Findings heretofore made and filed, whereupon

IT IS ORDERED

that said motion, so far as it prays for the setting aside of the general Findings and Judgment, be and the same is hereby allowed, and the said general Verdict or Findings and Judgment heretofore entered on the 21st day of May, 1917, be and the same are hereby vacated and set aside.

And the defendant having thereupon requested the court to make, sign and file special Findings of Fact and Conclusions of Law, as proposed by the defendant, which proposed Findings of Fact and Conclusions of Law are on file with the Clerk of this Court,

IT IS ORDERED

that the request of said defendant of the court to make, sign or file the said Findings of Fact and Conclusions of Law, or either of them, proposed by said defendant, be and the same is hereby declined and refused;

And it further appearing that the defendant thereupon requested the court to make, sign and file special Findings of Fact and Conclusions of Law herein, in accordance with the general Findings or Verdict heretofore entered and herein vacated for the purposes afore-

said, and it appearing that the court had determined, in its discretion, that special Findings or Conclusions in said cause were unnecessary

IT IS ORDERED

that the request of the defendant for the making, signing and filing of special Findings of Fact and Conclusions of Law in accordance with said general Findings or Verdict be, and the same is hereby refused.

And it further appearing that the defendant duly objected and excepted to the orders herein made, and to the court's refusal to make, sign or file either or all of the said Findings of Fact and Conclusions of Law proposed by it separately, and further excepted to the making of the order refusing to make, sign, and file special Findings of Fact and Conclusions of Law in conformity with the general Verdict or Findings heretofore entered herein, and for the purpose aforesaid, herein vacated

IT IS FURTHER ORDERED

that defendant be, and it hereby is allowed exceptions to said order,

And it further appearing that the purpose of vacating said finding and judgment having now been fully accomplished, and the Court having heretofore heard the evidence adduced and the arguments of counsel and now being fully advised in the premises, now makes and files the following findings, viz.:

"This cause coming on to be heard before the Court without the intervention of a jury and the Court having heard the testimony and argument of counsel, and now being sufficiently advised in the premises finds for the plaintiffs in the sum of Forty-seven Hundred Thirty-six and 38/100ths Dollars and the further sum of Four Hundred Seventy-five and 00/100ths Dollars as a reasonable attorney's fee.

CHAS. E. WOLVERTON,

Judge.

WHEREUPON, based upon the foregoing finding, it is adjudged that said plaintiffs do, have and recover of and from said defendant said sum of Forty-seven Hundred Thirty-six and 38/100ths Dollars and the further sum of Four Hundred Seventy-five and 00/100ths Dollars as a reasonable attorney's fee, together with their costs and disbursements therein taxed at \$32.66 and that they have execution therefor.

(Signed) CHAS. E. WOLVERTON,

Judge.

(Endorsed) Filed June 11, 1917.

G. H. MARSH, Clerk.

That thereafter, to-wit, on the 11th day of June, 1917, there was duly filed in said court and cause a Finding by the Court which (omitting title and formal parts) is in words and figures as follows, to-wit:

FINDING BY THE COURT

This cause coming on to be heard before the court without the intervention of a jury and the court having heard the testimony and the argument of counsel and now being sufficiently advised in the premises finds for the plaintiff in the sum of \$4736.38 and the further sum of \$475.00 as a reasonable attorney's fee.

(Signed) CHAS. E. WOLVERTON,

Judge.

(Endorsed) Filed June 11, 1917.

G. H. MARSH. Clerk.

That thereafter, to-wit, on the 21st day of June, 1917, there was duly filed in said court and cause a Petition for Writ of Error which (omitting title and formal parts) is in words and figures as follows, to-wit:

PETITION FOR WRIT OF ERROR

To the HON. CHAS. E. WOLVERTON, United States District Judge:

The above named defendant, The R. R. Thompson Estate Company, a corporation, feeling itself aggrieved by the finding and judgment rendered and entered in the above entitled cause on the 11th day of June, 1917, does hereby petition for a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors filed herewith, and prays that the said writ of error be allowed, and that citation be issued as provided by law, and that a transcript of the record, proceedings and

documents upon which said finding and judgment was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, under the rules of such court in such cases made and provided, and your petitioner further prays that the proper order relating to the required security to be required of it be made, and that upon the filing of proper security your honor sign supersedeas order herein.

BAUER & GREENE, and
A. H. McCURTAIN,

Attorneys for Defendant.

(Endorsed) Filed June 21, 1917.

G. H. MARSH, Clerk.

That thereafter, to-wit, on the 21st day of June, 1917, there was duly filed in said court and cause Assignments of Error which (omitting title and formal parts) are in words and figures as follows, to-wit:

ASSIGNMENTS OF ERROR

Now comes the defendant in the above entitled cause, and files the following assignment of errors upon which it will rely in its prosecution of writ of error in the above entitled cause from the finding and judgment made by this honorable court on the 11th day of June, 1917.

I.

That the United States District Court for the District of Oregon erred in admitting any evidence under the complaint filed in this cause, and in not holding

that the said complaint did not state facts sufficient to constitute a cause of action.

II.

That the said court erred in admitting and receiving in evidence promissory note of the Multnomah Hotel Company, a corporation, payable to the plaintiffs, and endorsed by Philip Gevurtz and I. Gevurtz & Sons, a corporation, marked plaintiffs' Exhibit A.

III.

That the said court erred in admitting and receiving in evidence the checks of the plaintiffs payable to the Multnomah Hotel Company, marked plaintiffs' Exhibits B and C.

IV.

That the said court erred in admitting and receiving in evidence the claims of the defendant filed in the bankruptcy matter of I. Gevurtz & Sons, marked plaintiffs' Exhibits D and E.

V.

That the said court erred in admitting and receiving in evidence stipulation between the attorneys for the trustee of the bankrupt estate of I. Gevurtz & Sons and the attorneys for the defendant, marked plaintiffs' Exhibit F.

VI.

That the said court erred in admitting and receiv-

ing in evidence a memorandum of authorities in behalf of the defendant in support of its claim in the bankruptcy proceeding of I. Gevurtz & Sons, and marked plaintiffs' Exhibit G.

VII.

That the said court erred in admitting and receiving in evidence the order of the Referee in Bankruptcy allowing the claim of the defendant in the matter of the bankruptcy of I. Gevurtz & Sons, and marked plaintiffs' Exhibit H.

VIII.

That the said court erred in admitting and receiving in evidence the dividend sheets of I. Gevurtz & Sons, marked plaintiffs' Exhibits I and J.

IX.

That the said court erred in admitting and receiving in evidence the schedules in bankruptcy of the Multnomah Hotel Company marked plaintiffs' Exhibit K.

X.

That the said court erred in failing and refusing to make, sign and file the special findings of fact proposed by the defendant, being numbered from 1 to 7 inclusive, and each of said findings of fact.

XI.

That the said court erred in failing and refusing to make, sign and file the conclusions of law proposed by

the defendant, and numbered from 1 to 4 inclusive, and each of them.

XII.

That the court erred in failing and refusing to make, sign and file special findings of fact in support of the general findings and judgment entered by the court herein.

XIII.

That the said court erred in holding that there was any evidence introduced at the trial to support the complaint or any judgment for the plaintiff.

XIV.

That the said court erred in not entering judgment for the defendant and against the plaintiff.

WHEREFORE, Defendant prays that said judgment be reversed, and that said District Court of the United States for the District of Oregon be ordered to enter a judgment reversing its decision and in favor of the defendant and against the plaintiff.

BAUER & GREENE, and
A. H. McCURTAIN,
 Attorneys for the Plaintiff in Error.

(Endorsed) Filed June 21, 1917.

G. H. MARSH, Clerk.

That thereafter, to-wit, on the 22nd day of June, 1917, there was duly filed in said court and cause Order

Allowing Writ of Error which (omitting title and formal parts) is in words and figures as follows, to-wit:

ORDER ALLOWING WRIT OF ERROR

On motion of A. H. McCurtain, of attorneys and counsel for defendant, it is hereby

ORDERED that a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, from the findings and judgment heretofore filed and entered herein, be, and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings, be forthwith transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit.

And it is further **ORDERED** that the bond to be filed by the defendant be fixed in the sum of \$6000.00; and it is further

ORDERED that the Clerk of this court issue writ of error herein as by law required.

CHAS. E. WOLVERTON,

District Judge.

Endorsed) Filed June 21, 1917.

G. H. MARSH, Clerk.

That thereafter, to-wit, on the 22nd day of June, 1917, there was duly filed in said court and cause a Writ of Error which (omitting title and formal parts) is in words and figures as follows, to-wit:

WRIT OF ERROR

The United States of America,—ss.

The President of the United States of America,

To the Judges of the District Court of the United States for the District of Oregon, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Charles E. Wolverton, one of you, between Louise Weinhard and Anna Wessinger, Paul Wessinger and Henry Wagner, Executrices and Executors, respectively of the last Will and Testament of Henry Weinhard, deceased, plaintiffs and defendants in error and The R. R. Thompson Estate, a corporation, defendant and plaintiff in error, a manifest error hath happened to the great damage of the said plaintiff in error as by complaint doth appear, and we being willing that error, if any, hath been, should be corrected and full and speedy justice done to the parties aforesaid and in this behalf do command you if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid being one and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what if right

and according to the laws and customs of the United States of America should be done.

Witness, the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the United States, this 22nd day of June, A. D. 1917.

(Signed) G. H. MARSH,

Clerk of the District Court of the United States
for the District of Oregon.

(Seal)

(Endorsed) Filed June 22, 1917.

G. H. MARSH, Clerk.

That thereafter, to-wit, on the 22nd day of June, 1917, there was duly filed in said court and cause a Bond which (omitting title and formal parts) is in words and figures as follows, to-wit:

BOND

KNOW ALL MEN BY THESE PRESENTS:
That The R. R. Thompson Estate Company, a corporation, defendant in the above entitled action, as Principal, and THE MASSACHUSETTS BONDING & INSURANCE COMPANY OF BOSTON, MASSACHUSETTS, a corporation, duly organized and existing under and by virtue of the laws of the State of Massachusetts, and as such corporation authorized to do business, and doing business in the State of Oregon, as Surety, are held and firmly bound unto Louise Weinhard and Anna Wessinger, Paul Wessinger and Henry Wagner, Executrices and Executors,

respectively of the last Will and Testament of Henry Weinhard, deceased, plaintiffs in the above entitled action, in the sum of Six Thousand Dollars (\$6000.00), to be paid unto the said plaintiffs, their administrators or assigns, and for the payment of which sum well and truly to be made we bind ourselves and each of us, and our and each of our successors and assigns, jointly and severally, firmly by these presents.

SEALED with our seals, and dated this 11th day of June, 1917.

WHEREAS, the said defendant in the above entitled action has prosecuted or is about to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the findings and judgment rendered and entered in the above cause on the day of June, 1917, which said finding and judgment is hereby referred to and made a part hereof,

NOW THEREFORE, the condition of this obligation is such that if said defendant in the above entitled action shall prosecute its said writ of error to effect and answer all damages and costs if it fails to make said writ of error good, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

The R. R. Thompson Estate Company,
a Corporation,

(Signed) By A. H. McCurtain,
Of its Attorneys.

The Massachusetts Bonding & Insurance Company
 of Boston, Massachusetts, a Corporation,
 (Signed) By Frank E. Smith,
 Its Attorney-in-Fact.

Approved this 22nd day of June, 1917.

(Signed) CHAS. E. WOLVERTON,
 Judge.

(Endorsed) Filed June 22, 1917.

G. H. MARSH, Clerk.

That thereafter, to-wit, on the 22nd day of June, 1917, there was duly filed in said court and cause an Order of Supersedeas which (omitting title and formal parts) is in words and figures as follows, to-wit:

ORDER OF SUPERSEDEAS

This cause coming on to be heard this 21st day of June, 1917, upon the application of the plaintiff in error for a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, and said writ of error having been allowed, it is

ORDERED that the same shall operate as a supersedeas, the said plaintiff in error having executed bond in the sum of \$6000.00 as provided by law, and the Clerk is hereby directed to stay the mandate of the District Court of the United States for the District of Oregon until the further order of this court.

(Signed) CHAS. E. WOLVERTON,
 District Judge.

(Endorsed) Filed June 22, 1917.

G. H. MARSH, Clerk.

That thereafter, to-wit, on the 22nd day of June, 1917, there was duly filed in said court and cause a Citation on Writ of Error which (omitting title and formal parts) is in words and figures as follows, to-wit:

CITATION ON WRIT OF ERROR.

United States of America,
District of Oregon,—ss.

To Louise Weinhard and Anna Wessinger, Paul Wessinger and Henry Wagner, Executrices and Executors, respectively of the last Will and Testament of Henry Weinhard, deceased, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Circuit Court of the United States for the District of Oregon, wherein The R. R. Thompson Estate Company, a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 22nd day of June, in the year of one Lord, one thousand, nine hundred and seventeen.

(Signed) CLIAS. E. WOLVERTON,

Judge.

Service of the foregoing citation is hereby accepted in Portland, Oregon, this 22nd day of June, 1917.

(Signed) SIDNEY TEISER,

Of Attorneys for Defendant in Error.

(Endorsed) Filed June 22, 1917.

G. H. MARSH, Clerk.

That thereafter, to-wit, on the 16th day of July, 1917, there was duly filed in said court and cause an Order for 'Time to File 'Transcript which (omitting title and formal parts) is in words and figures as follows, to-wit:

ORDER FOR TIME TO FILE TRANSCRIPT.

For sufficient cause shown, it is hereby

ORDERED that the plaintiff in error have to and including the 31st day of August, 1917, within which to prepare and file its transcript of the record and evidence in the Circuit Court of Appeals in the above entitled cause.

Dated at Portland, Oregon, this 16th day of July, 1917.

(Sg.) CHAS. E. WOLVERTON,

District Judge.

(Endorsed) Filed July 16, 1917.

G. H. MARSH, Clerk.

That thereafter, to-wit, on the 2nd day of August, 1917, there was duly filed in said court and cause a Bill of Exceptions and Statement of Facts, which (omit-

ting title and formal parts) is in words and figures as follows, to-wit:

BILL OF EXCEPTIONS AND STATEMENT OF FACTS.

BE IT REMEMBERED, that the above entitled action came duly and regularly on for trial on the 27th day of March, 1917, plaintiffs appearing by Sidney Teiser and J. Silverstone, their attorneys, and the defendant appearing by Bauer & Greene and A. H. McCurtain, its attorneys, and trial by jury having been waived in writing by both plaintiffs and defendant, whereupon after the statement of the cause by the attorneys for the plaintiffs and the defendant, respectively, the following proceedings were had, to-wit:

Mr. Teiser: Do I understand that you will not take the position that Philip Gevurtz had no authority to sign that note, or do you waive that?

Mr. McCurtain: We will waive that. There was some answer filed here, your Honor, going to the question of the authority of Philip Gevurtz, as president of the corporation, to sign this note, but we waive that proposition.

We would, however, your Honor, at this time ask your Honor to make an order requiring the plaintiffs to elect as to whether they will proceed upon the cause of action first stated in their complaint or upon the second cause of action therein stated. We take the position in that behalf that the two causes of action are absolutely at variance and antagonistic to each other. The

theory of the first cause of action is that the Thompson Estate Company, the defendant, agreed to pay these debts in excess of \$210,000, and they state specifically in the second cause of action that the debts did not amount to \$175,000.

Mr. Teiser: If your Honor please, this matter was argued before Judge Bean at length on one occasion, on the same motion. Judge Bean denied the motion, and stated that he would reserve the right at the trial to strike out one of other of the causes of action if it became apparent it should be done. In other words, he overruled the motion without prejudice, I suppose. Now, your Honor will note that there is not anything contradictory in this complaint whatsoever. The first cause of action states that the R. R. Thompson Estate Company agreed to pay the debts of the Hotel Company in excess of \$210,000. That is all it says. There is no statement at all there that the debts were in excess of that sum or under it. I defy counsel to find anywhere in that complaint any statement anywhere that the debts were over \$175,000. Our theory was that it didn't make any difference whether or not the debts were more than \$210,000, but if they were, we ought to recover on it on the grounds of their assumed promise. It is not necessary for us to go out of our way to show that. All that is necessary for us to do, and we maintain we have a right to rely on that situation, is that there was \$175,000 worth of debts. Now, there isn't anything inconsistent in those two causes of action. They can both be tried here and heard here.

COURT: It is not entirely clear in my mind at the

present time. I see no reason why this matter may not proceed, and if in the course of the trial it should develop the court can make the order at that time.

Mr. McCurtain: I think there is no reason, your Honor, why you should not proceed with the evidence, and reserve your ruling in any event. But we want, for the purpose of preserving the record, to show we make the motion at this time.

COURT: Very well.

PAUL WESSINGER, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Teiser:

State your name and residence.

A. Paul Wessinger, Portland, Oregon.

Q. Mr. Wessinger, you are one of the executors of the estate of Henry Weinhard, deceased?

A. Yes, sir.

Q. And as such are one of the plaintiffs in this action?

A. Yes, sir.

Q. Mr. Wessinger, is the note I now hand you the note which is the subject of this suit?

A. Yes, sir.

Mr. Teiser: I ask that that be marked for identification, and introduced in evidence as "Plaintiffs' Exhibit A."

COURT: What is the amount?

A. \$4500. The note is made March 6, 1912, isn't it?

Mr. Teiser: Yes. I now introduce this note in evidence.

Mr. McCurtain: Your Honor, we object to the introduction of this note, or any evidence under the allegations of the complaint, on the ground that the complaint does not state facts sufficient to constitute a cause of action. I want to make that general objection for the purpose of the record.

COURT: You are not insisting upon it?

Mr. McCurtain: I want to insist upon it, yes, your Honor, but I assume that your Honor will perhaps want to rule on that as you did on the motion to elect. I cannot see how this note can bind the Thompson Estate Company.

COURT: The court will overrule your objection, and you may have an exception.

Mr. McCurtain: Very well, your Honor. I do not want to be making objections all the time, and delay the procedure of the court, but we want that objection to go to the introduction of any testimony supporting the issues of the complaint. Your Honor will overrule it, and hear the evidence.

COURT: That may be understood.

Which said note marked Exhibit "A" is in words and figures as follows, to-wit:

\$4500.00

Portland, Ore., Mar. 6th, 1912.

On demand after date, without grace, we or either of us promise to pay to the order of Louise Weinhard,

Anna Wessinger, Paul Wessinger and Henry Wagner, Executrices and Executors, respectively, of the last Will and Testament of Henry Weinhard, deceased, at Portland, Oregon. Forty-five Hundred and no/100 Dollars, in Gold Coin of the United States of America, of the present standard value, with interest thereon in like Gold Coin at the rate of six per cent per annum from date until paid, for value received. Interest to be paid quarterly, and if not so paid, the whole sum of both principal and interest to become immediately due and collectible, at the option of the holder of this note. And in case suit or action is instituted to collect this note, or any portion thereof, we or either of us promise and agree to pay, in addition to the costs and disbursements provided by statute, such additional sum, in like Gold Coin, as the Court may adjudge reasonable, for attorney's fees to be allowed in said suit or action.

(Sgd) Multnomah Hotel Co.

Philip Gevurtz, Pres't.

(Ent 7/20/12)

Philip Gevurtz

I. Gevurtz & Sons

Philip Gevurtz, Pres't.

Endorsed as follows: May 4/1914 Rec'd on within note \$500. Oct. 6/1914 Rec'd on within note \$500.

Q. What was the consideration for that note, Mr. Wessinger?

A. Well, the note calls for \$4500, and we gave two checks of a total amount of \$4500.

Mr. Teiser: I don't know that these are material,

but I will introduce them so as to show the consideration.

A. Here is a note of \$2000 which I signed—

Q. A check?

A. And one of \$2500, total of \$4500, dated March 6, 1912, the same date as the note.

Q. You said “note”—you meant check?

A. Check. We signed the checks.

Q. And these two checks, amounting to \$4500, were given in return for the note which you have presented in evidence?

A. Yes, for the note; or for these the note was made out, for those two checks.

COURT: Who is the maker of the note?

Mr. Teiser: The Multnomah Hotel Company is the maker of the note, and it was also signed, as accommodation indorser, that is, the complaint says so, and I will bring that out in a minute, by Philip Gevurtz and I. Gevurtz & Sons. I introduce the two checks in evidence.

Mr. McCurtain: I make the objection that they are incompetent, irrelevant and immaterial.

COURT: Very well, the objection is overruled. They simply show the payment of the money in accordance with the note.

Which said checks were marked Exhibits “B” and “C” and are in words and figures as follows, to-wit:

Exhibit "B"

"HENRY WEINHARD BREWERY" No. 3966

Portland, Oregon, March 6, 1912.

Pay to the order of Multnomah Hotel Company
\$2000.00 Two Thousand and no/100 Dollars.

(Sgd) Estate Henry Weinhard, Dec'd

(Sgd) Paul Wessinger

(Sgd) Henry Wagner

Executors

THE UNITED STATES NATIONAL

Portland, Oregon.

Endorsed as follows: (Sgd) Multnomah Hotel
Company.

Stamped endorsement: (Paid Mar. 7, 1912, Port-
land, Oregon, First National Bank). (Pay to order
of First National Bank—452—Portland, Oregon. I
Gevurtz & Sons).

Exhibit "C"

"HENRY WEINHARD BREWERY"

Portland, Oregon, March 6, 1912.

Pay to the order of Multnomah Hotel Company
\$2500.00 Twenty-five Hundred and no/100 Dollars.

(Sgd) Estate Henry Weinhard, Dec'd

(Sgd) Paul Wessinger

(Sgd) Henry Wagner

Executors

THE UNITED STATES NATIONAL
Portland, Oregon.

Endorsed as follows: (Sgd) Multnomah Hotel Company.

Stamped endorsement: (Received payment through Clearing House March 8, 1912—4—. First National Bank). (Pay to order of First National Bank, Portland, Oregon. I Gevurtz & Sons)."

Q. To whom was the money advanced?

A. To Mr. Gevurtz. I think his name is Philip Gevurtz, Junior, is it not?

Q. I mean, to whom was this money given?

A. Oh, the money was made out to the Multnomah Hotel Company.

Q. To whom was the money loaned?

A. To the Multnomah Hotel Company.

Q. And how did it come that Philip Gevurtz individually and I. Gevurtz & Sons signed this note?

A. Well, we have a rule that for moneys loaned, for loans for notes, they have to be secured some way, either by property, as this was not, positively, in this way we took the individual indorsement of what we thought at the time responsible people; that is, Mr. Gevurtz and Gevurtz & Sons. That was done at my personal request.

COURT: Whom did you deal with in loaning this money to the company?

A. Mr. Gevurtz, the president of the Multnomah Hotel Company, came personally to my private office. I took him over to Mr. Wagner's.

COURT: How is that note signed?

Mr. Teiser: Multnomah Hotel Company, by Philip Gevurtz, President. It is also signed by Philip Gevurtz and I. Gevurtz & Sons.

CROSS EXAMINATION.

Questions by Mr. McCurtain:

Now, Mr. Wessinger, whom do you claim you loaned this money to—to I. Gevurtz & Sons or upon their credit, or to the Multnomah Hotel Company?

A. No, to the Multnomah Hotel Company.

Q. And in order to secure yourselves against loss on account of their inability to pay, you secured also the accommodation signature of I. Gevurtz & Sons and Philip Gevurtz? Is that right?

A. Yes sir. We thought it was security at the time, as I stated.

Q. You considered them good?

A. Yes.

Q. Now, at that time, Mr. Wessinger, isn't it a fact that you advanced to I. Gevurtz & Sons \$4500 or \$6000, and undertook to accept stock in the Multnomah Hotel Company?

A. No, no. The transaction was always—we had no reason to loan I. Gevurtz & Sons any money, but we had reasons for loaning the Multnomah Hotel Company money; and Gevurtz was there, and said that he intended dealing with the Henry Weinhard Brewery, and the note is made to the Henry Wienhard Estate; and naturally he would look for accommodations to those whom he was supposed to be dealing with, whom he in-

tended to be dealing with. Just like a bank—a bank loans money only to its own clients. So do we.

Q. That is to say, your policy was to get them into debt to you—to loan them money, and in that way they would buy beer and other—

A. I resent that kind of question. I didn't go to Mr. Gevurtz, Mr. Gevurtz came to me—to my private office—and asked for the loan. I didn't want to force anybody to accept money as a loan. That is all.

Q. I understand.

A. He came and asked, and we took it under consideration for several days till we said yes.

Q. Then I misunderstood you when you stated to the Court that your policy was that they would deal with you on account of doing business with them?

A. He came voluntarily. I didn't seek him. He came to my office of his own free will and made the statement that he intended to deal with us, and it was a big hotel—he expected large sales, and all that; and I think I was competent enough to judge properly about how much the sales could possibly amount to and all that, and with a view of facilitating the trade of the brewery, this loan was made.

Q. That is what I want to get at, yes. Now, what do you say as to whether it is a fact or not that at the time you advanced this \$4500, it was understood and agreed that you should take stock in the Multnomah Hotel Company to the extent of this advance?

A. Well, no, it was not exactly agreed, because if I had agreed to that it would have been carried out. There was talk about it.

Q. There were negotiations tending to that, but they were not consummated?

A. I mean, that was Mr. Gevurtz' proposition, and that part of Mr. Gevurtz' proposition was turned down. We didn't decide to take stock in it, but we said we had no objections to making a loan and—well, I stated all the balance before. We made the loan to the Multnomah Hotel Company, and had it endorsed as security.

REDIRECT EXAMINATION.

Q. I just want to ask Mr. Wessinger another question. Do you know what the balance due on that note is?

A. I believe it is—I think the note is \$4500, and I believe there are two payments of \$500 each.

Q. I wanted to ask you whether there was any other payment made that was not endorsed on the note?

A. No.

Q. Do these endorsements show the date the payments were made?

A. Yes. It is \$3500.00 plus whatever interest there may be.

(Witness excused.)

Mr. Teiser: Do you admit that that is the signature of Mr. Bauer?

Mr. McCurtain: Yes; there is no question about that.

Mr. Teiser: May I submit, there has been a demand made for the payment of this note?

Mr. McCurtain: Yes, we admit about the date of this letter there was a demand made.

Mr. Teiser: Prior to the date of this letter.

Mr. McCurtain: Sometime prior to April 19, 1916, through Mr. Silverstone, attorney, a demand was made upon the Thompson Estate Company for the payment of this note, and that the demand was refused; that he appeared at that time for the Weinhard Brewing Company, for the plaintiff.

Mr. Teiser: Now, I have a series of papers to offer in evidence, and I understand from counsel that they will be admitted as files from the court, without bringing the clerk or the referee to testify to them.

Mr. Bauer: We won't raise any question about that.

Mr. Teiser: I therefore introduce in evidence claim of R. R. Thompson Estate Company, filed with the referee in bankruptcy in the matter of I. Gevurtz & Sons, the original claim.

Mr. McCurtain: I make objection to the introduction of this evidence on the ground that the same is incompetent, irrelevant and immaterial and does not tend in any way to bind the Thompson Estate to the payment of this claim, and that there is nothing therein contained which is in writnig and signed by the Thompson Estate Company charging them with the payment of this claim; that there is no consideration for the making of such a promise, if there is anything which might be so construed.

Mr. Teiser: This claim is quite lengthy, your Honor, I will point out that portion which we claim is material. It is claimed, first item here, "I. Gevurtz &

Sons in account with the R. R. Thompson Estate Company," and then it is the item on one of the pages showing the amount of \$6000 due Henry Weinhard, and also the contract of indemnity, the note, the minutes of the meetings, and the option and other memoranda attached to said claim; and if your Honor will permit me to interrupt a second, I am now going to introduce the amended claim; that is, an amendment to that claim, or rather it is a substitution for that claim, which adopts by stipulation the exhibits in the claim, and in the amended claim it is set forth "Of all of said payments and also for the amount of this claim (that is the claim filed) which said R. R. Thompson Estate Co. advanced for said Multnomah Hotel Company and I. Gevurtz & Sons."

Which said proof of claim was marked Exhibit "D" and is in words and figures as follows, to-wit:

**"IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE DISTRICT
OF OREGON.**

In the Matter of I. Gevurtz & Sons, a corporation.
Bankrupt.

IN BANKRUPTCY.

At Portland, in said District of Oregon, on the 29th day of May A. D. 1913, came R. O. Yates, of Portland, in the County of Multnomah, and State of Oregon, and made oath and says that he is Secretary of The R. R. Thompson Estate Company, a corporation,

incorporated by and under the laws of the State of California, and carrying on business in the State of California, and at Portland, in the County of Multnomah, and State of Oregon, and that he is duly authorized to make this proof, and said that the said bankrupt, the corporation by whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said corporation in the sum of \$60,489.42; that the consideration of said debt is as follows: \$35,000.00 thereof and \$1050.00, interest thereon from January 1, 1913, on a promissory note dated January 16, 1913, payable on or before July 1, 1913, executed by I. Gevurtz & Sons in favor of The R. R. Thompson Estate Company, with interest at the rate of 6% per annum, copy of which is hereto attached, marked Exhibit "II" and upon which no payments have been made, and \$24,439.42, the balance due from said bankrupt to The R. R. Thompson Estate Co. under and by virtue of the terms of an agreement of sale by said bankrupt to The R. R. Thompson Estate Co. of all the common and preferred stock of the Multnomah Hotel Company, a corporation organized under the laws of the State of Oregon, free and clear of all liabilities, and a guaranty and indemnity by said I. Gevurtz & Sons to The R. R. Thompson Estate Co. against any and all indebtedness and liabilities of the Multnomah Hotel Company and against all claims or demands, actions, liabilities, suits, fines, liens and contracts of indebtedness of any character whatsoever, either due to I. Gevurtz & Sons directly or indirectly, or to any other

person, firm or corporation, arising out of or incurred in the operation of said Multnomah Hotel from the time of its beginning to the date of the delivery of possession of all of the common and preferred stock of Multnomah Hotel Company by I. Gevurtz & Sons to said The R. R. Thompson Estate Co., over and above the sum of \$210,000.00, being the aggregate amount of the purchase price of said common and preferred stock to-wit: \$175,000.00, and the amount of \$35,000.00 evidenced by the promissory note hereinabove referred to and marked Exhibit "H," and the guaranty of said bankrupt to pay any such indebtedness or liabilities which may remain unpaid or be in excess of the amount of \$210,000.00, less any and all credits on the note of \$35,000.00, to which said bankrupt might be entitled on account of the collection of any book accounts and bills receivable due Multnomah Hotel Company up to the 16th day of January, 1913, whenever the same have been collected, a copy of which said contract is hereto attached, marked Exhibit "G," a copy of which said contract of guaranty and indemnity is hereto attached, Exhibit "I," and a copy of the minutes of the special meeting of the board of directors of said bankrupt, ratifying the sale of said stock of Multnomah Hotel Company to said R. R. Thompson Estate Co. and authorizing the issue of the guaranty and indemnity aforesaid, marked Exhibit "J," a detailed statement of all claims, liabilities, and demands due and owing from the Multnomah Hotel Company and assumed and agreed to be paid by said bankrupt being hereto attached, marked Exhibits "A," "B," "C," "D," "E," and "F."

“That no part of said debt has been paid.

“That there are no set-offs or counterclaims to the same; that no judgment has ever been recovered thereon; and that said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever.

“That in addition to the foregoing accounts and liabilities as exhibited and shown by the various exhibits hereinabove referred to, there appears on the original books of the Multnomah Hotel Company as kept by the old management, credits in favor of Philip Gevurtz, in the sum of \$4126.29, Alex Gevurtz, in the sum of \$1378.00, and Louis Gevurtz, in the sum of \$1378.00, in the aggregate a total of \$———. That the said Philip Gevurtz, Alex. Gevurtz and Louis Gevurtz have never claimed or demanded the said sums of money from either the Multnomah Hotel Company or the R. R. Thompson Estate Co. and from the nature of the accounts it might appear that they, or either of them may have a claim against I. Gevurtz & Sons therefor, but that each of said Philip Gevurtz, Alex Gevurtz and Louis Gevurtz are estopped from claiming or collecting said demands or accounts from The R. R. Thompson Estate Co., or the Multnomah Hotel Company, each of them having been directors of I. Gevurtz & Sons at the time of the adoption of the resolutions by I. Gevurtz & Sons ratifying the sale of said common and preferred stock of the Multnomah Hotel Company to The R. R. Thompson Estate Co. and authorizing the execution of the indemnity by said I. Gevurtz

& Sons hereinabove referred to, as Exhibits "G" and "I." and that the said Philip Gevurtz, Alex Gevurtz and Louis Gevurtz are estopped by their actions as directors of I. Gevurtz & Sons, and in accepting I. Gevurtz & Sons as liable for said claims, from collecting the same from The R. R. Thompson Estate Co. or the Multnomah Hotel Company. However, if the said Philip Gevurtz, Alex Gevurtz and Louis Gevurtz should establish said claims against the Multnomah Hotel Company or The R. R. Thompson Estate Co. this deponent will have the right to file its further claim against the above named bankrupts for the same.

(Sgd) R. O. YATES,
Secretary of said Corporation.

Subscribed and sworn to before me this 29th day of May, 1913.

CECIL H. BAUER,
Notary Public for Oregon."

(Verified May 29, 1913, by R. O. Yates, as Secretary of The R. R. Thompson Estate Company.)

Which said Amended Proof of Claim was marked Exhibit "E" and is in words and figures as follows, to-wit:

"In the District Court of the United States for the District of Oregon.

In the Matter of I. Gevurtz & Sons, a corporation, Bankrupt.	{	IN BANKRUPTCY
--------------------------------------------------------------------	---	---------------

"At Portland, in said District of Oregon, on the 26th day of November, A. D. 1913, came R. O. Yates, of Portland, in the County of Multnomah and State of

Oregon, and as and for an amended proof of claim, made oath and says that he is the Secretary of The R. R. Thompson Estate Company, a corporation, incorporated by and under the laws of the State of California, and carrying on business in the State of California, and at Portland, in the County of Multnomah and State of Oregon, and that he is duly authorized to make this proof, and says that the said bankrupt, the corporation by whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said corporation in the sum of \$60,489.42; that the consideration of said debt is as follows: \$35,000.00 thereof and \$1050.00, interest thereon from January 1, 1913, on a promissory note dated January 16, 1913, payable on or before July 1, 1913, executed by I. Gevurtz & Sons in favor of The R. R. Thompson Estate Company, with interest at the rate of 6% per annum, copy of which is hereto attached, marked Exhibit "II," and upon which no payments have been made, and \$24,439.42, the balance due from said bankrupt to The R. R. Thompson Estate Company under and by virtue of the terms of an agreement of sale by said bankrupt to The R. R. Thompson Estate Co. of all of the common and preferred stock of the Multnomah Hotel Company, a corporation organized under the laws of the State of Oregon, free and clear of all liabilities, and a guaranty and indemnity by said I. Gevurtz & Sons to The R. R. Thompson Estate Co. against any and all indebtedness and liabilities of the Multnomah Hotel Company and against all claims or

demands, actions, liabilities, suits, fines, liens and contracts of indebtedness of any character whatsoever, either due to I. Gevurtz & Sons directly or indirectly, or to any other person, firm or corporation, arising out of or incurred in the operation of said Multnomah Hotel from the time of its beginning to the date of the delivery of possession of all of the common and preferred stock of Multnomah Hotel Company by I. Gevurtz & Sons to said R. R. Thompson Estate Co., over and above the sum of \$210,000.00, being the aggregate amount of the purchase price of said common and preferred stock, to-wit: \$175,000.00, and the amount of \$35,000.00 evidenced by the promissory note hereinabove referred to and marked Exhibit "H," and the guaranty of said bankrupt to pay any of such indebtedness or liabilities which may remain unpaid or be in excess of the amount of \$210,000.00, less any and all credits on the note of \$35,000.00, to which said bankrupt might be entitled on account of the collection of any book accounts and bills receivable due Multnomah Hotel Company up to the 16th day of January, 1913, whenever the same have been collected, a copy of which said contract is hereto attached, marked Exhibit "C," a copy of which said contract of guaranty and indemnity is hereto attached, marked Exhibit "I," and a copy of the minutes of the special meeting of the board of directors of said bankrupt, ratifying the sale of said stock of Multnomah Hotel Company to said The R. R. Thompson Estate Co. and authorizing the issue of the guaranty and indemnity aforesaid, marked Exhibit "J," a detailed statement of all claims, liabilities, and

demands due and owing from the Multnomah Hotel Company and assumed and agreed to be paid by said bankrupt being hereto attached, marked Exhibits "A," "B," "C," "D," "E" and "F."

"That no part of said debt has been paid, except that an allowance has been made in the sum of \$2933.38, by stipulation made and entered into by and between The R. R. Thompson Estate Company and the Trustees of I. Gevurtz & Sons, Bankrupt, which is on file with the Referee in Bankruptcy, whereby the claim has been reduced to the sum of \$57,566.04.

"There are no set-offs or counterclaims to the same; that no judgment has ever been recovered thereon; and that said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever.

"That in addition to the foregoing accounts and liabilities as exhibited and shown by the various exhibits hereinabove referred to, there appears on the original books of the Multnomah Hotel Company as kept by the old management credits in favor of Philip Gevurtz, in the sum of \$4126.29, Alex Gevurtz, in the sum of \$1378.00, and Louis Gevurtz, in the sum of \$1378.00, in the aggregate a total sum of \$———. That the said Philip Gevurtz, Alex Gevurtz and Louis Gevurtz have never claimed or demanded the said sums of money from either the Multnomah Hotel Company or The R. R. Thompson Estate Co. and from the nature of the accounts it might appear that they, or either of them may have a claim against I. Gevurtz & Sons

therefor, but that each of said Philip Gevurtz, Alex. Gevurtz and Louis Gevurtz are estopped from claiming or collecting said demands or accounts from The R. R. Thompson Estate Co. or the Multnomah Hotel Company, each of them having been directors of I. Gevurtz & Sons at the time of the adoption of the resolutions by I. Gevurtz & Sons ratifying the sale of said common and preferred stock of the Multnomah Hotel Company to The R. R. Thompson Estate Co. and authorizing the execution of the indemnity by said I. Gevurtz & Sons hereinabove referred to as Exhibits "G" and "I," and that the said Philip Gevurtz, Alex. Gevurtz and Louis Gevurtz are estopped by their actions as directors of I. Gevurtz & Sons, and in accepting I. Gevurtz & Sons as liable for said claims, from collecting the same from The R. R. Thompson Estate Co. or the Multnomah Hotel Company. However, if said Philip Gevurtz, Alex. Gevurtz and Louis Gevurtz should establish said claims against the Multnomah Hotel Company or The R. R. Thompson Estate Co. this deponent will have the right to file its further claim against the above named bankrupts for the same.

"And deponent further states that in truth and in fact the bankrupt is directly and primarily liable to The R. R. Thompson Estate Co. in the full sum hereinabove set out for the reason that the said Multnomah Hotel Company, while in form was a separate and independent corporation, in fact was a part and parcel of the business of the bankrupt; the said bankrupt acquired the lease on the property and completely furnished and equipped it during the year 1912, but for

the purpose of conducting the business and facilitating the manner of operating the said Multnomah Hotel Company, a corporation was formed in the year 1912, and I. Gevurtz & Sons, the Bankrupt, took and held all of the common stock of the corporation to-wit: 2000 shares, of the par value of \$100.00 per share, and 1450 shares out of the 1500 shares of the preferred stock. All of the directors and officers of the Multnomah Hotel Company were officers and directors of I. Gevurtz & Sons. And no separate account was kept of the Multnomah Hotel Company in the banks, but all of the money and proceeds of the operation of said hotel company were deposited in the First National Bank with the account of I. Gevurtz & Sons and mingled with it. That in order to furnish the hotel I. Gevurtz & Sons, bankrupt, was obliged to borrow large sums of money from the First National Bank of Portland, Oregon, and other banks, and to also pledge its credit to stock up the hotel with provisions and to meet the payroll of the business of the hotel. The money borrowed from the First National Bank for the use of the Multnomah Hotel Company was secured on notes signed by I. Gevurtz & Sons as makers, with the Multnomah Hotel Company. And stock of the Multnomah Hotel Company owned by I. Gevurtz & Sons was hypothecated as collateral security therefor. That the Multnomah Hotel Company had no assets or credit except such as had been furnished by I. Gevurtz & Sons.

“That the amount of the indebtedness of the Multnomah Hotel Company when The R. R. Thompson Estate Company purchased all of the common and pre-

ferred stock, amounting to about \$235,000.00, was practically guaranteed by I. Gevurtz & Sons, or secured by it and I. Gevurtz & Sons was liable on practically all of said indebtedness. That \$143,000.00 of the liabilities of Multnomah Hotel Company was on notes executed by I. Gevurtz & Sons and Multnomah Hotel Company to the First National Bank of Portland, Oregon, and from which I. Gevurtz & Sons was directly liable.

“That while the Multnomah Hotel Company operated the hotel as a separate entity, the Multnomah Hotel Company was merely a subsidiary corporation to I. Gevurtz & Sons and was incorporated only for the purpose of facilitating the conduct and management of the business and was in truth and in fact the agent for I. Gevurtz & Sons for whose benefit the hotel was operated and conducted, and I. Gevurtz & Sons was in truth and in fact liable and responsible for all of the indebtedness of the Hotel Company. That I. Gevurtz & Sons, bankrupt, in assuming the responsibility of The R. R. Thompson Estate Co. for the indebtedness of Multnomah Hotel Company, and in guaranteeing the same really and in truth and in fact did not increase its indebtedness or liability, as it was in fact already liable and responsible for all of said indebtedness. That all of the payments made by The R. R. Thompson Estate Company for the Multnomah Hotel Company stock were applied to the payment of indebtedness for which I. Gevurtz & Sons, the bankrupt, was liable, and said I. Gevurtz & Sons, bankrupt, obtained the benefit of all of said payments and also for the amount of this claim which said R. R.

Thompson Estate Co. advanced for said Multnomah Hotel Company and I Gevurtz & Sons.

“That if The R. R. Thompson Estate Co. had not purchased the Multnomah Hotel Company from I. Gevurtz & Sons the liabilities of I. Gevurtz & Sons would have been increased by the sum of at least two hundred and thirty or forty thousand dollars, while the assets would not have been increased for the reason that The R. R. Thompson Estate Co. had a first mortgage on all of the assets of the Multnomah Hotel Company, in the sum of \$75,000.00, as security for the lease executed by it to I. Gevurtz & Sons, and there would have been no equity left for the creditors of the Multnomah Hotel Company or I. Gevurtz & Sons.

R. O. YATES,

Secretary of said Corporation.

Subscribed and sworn to before me this 26th day of November, 1913.

CECIL H. BAUER,

Notary Public for Oregon.

(Verified by R. O. Yates, Secretary of R. R. Thompson Estate Co. November 26th, 1913.)

Which said Exhibit “E” is endorsed on the back as follows: No. 380. “Filed for \$60,489.42. Allowed after hearing for \$57,556.04. (Sgr) G. C. Murphy, Referee.

Stamped: “Filed November 11, 1913.

Attached to Exhibit “D” and by reference made a part of Exhibit “E” was an itemized statement of account, the first page of which is as follows:

I. GEVURTZ & SONS

—in account with—

THE R. R. THOMPSON ESTATE COMPANY

89

LIABILITIES:

	Amnt. Due	Amnt. Paid	Bal. Due
Exhibit A—Accrued Wages.....	\$5,276.51	\$5,276.51	
B—Trade Accts. Payable.....	50,792.92	50,501.12	291.80
C—Sundry Accts. Payable.....	18,724.40	16,484.29	2240.11
D—Bills Payable & Interest.....	169,118.79	162,208.54	6910.25
	<hr/> \$243,912.62	<hr/> \$234,470.46	<hr/> \$9442.16

ASSETS:

Exhibit E—Sundry Accts. Receivable.....	3,148.58	1,247.43	1901.15
F—Guests Receivable.....	11,234.47	8,225.77	3008.70
	<hr/> 14,383.05	<hr/> 9,473.20	<hr/> 4909.85

Total liabilities of Multnomah Hotel Company at date of purchase by The R. R. Thompson Estate Company on Jan. 16, 1913, as per Exhibits A, B, C & D.....	\$243,912.62
Total collected on old assets since Jan. 16, 1913, as per Exhibits E & F.....	9,473.20
	<hr/>
	\$234,439.42

Purchase price paid for stock of Multnomah Hotel Company by the R. R. Thompson Estate Company in accordance with terms of option, a copy of which is attached hereto and marked "Exhibit G".....	175,000.00
Net amount owing The R. R. Thompson Estate Company by I. Gevurtz & Sons on account excess liabilities over \$175,000..	59,439.42
\$35,000.00 of which is covered by a note, copy of which is attached hereto and marked "Exhibit II" and the balance of \$24,439.42 is covered by their guarantee, copy of which is attached hereto and marked "Exhibit I." Interest on \$35,000 @ 6% Jan. 1, 1913, to July 1, 1913.....	1,050.00

Total amount of claim.....\$ 60,489.42

Note—A copy of the proceedings of special meeting held on January 16, 1913, by I. Gevurtz & Sons, at which meeting the execution of Exhibits "G," "H" and "I" were authorized and ratified, is attached hereto and marked "Exhibit J."

Exhibit "A" attached to and forming a part of said itemized statement consists of an itemized statement of

moneys due to employees of Multnomah Hotel Company to January, 1913, and paid to them, aggregating the sum of \$5276.51, as shown on the summary of liabilities, "Exhibit A—Accrued Wages," heretofore set forth.

Exhibit "B" as aforesaid consisting of an itemized statement of trade accounts payable January 16, 1913, and payments made thereon by Multnomah Hotel Company since January 16, 1913, aggregating the sum of \$50,792.92 in amount, upon which payments are shown in the sum of \$50,501.12, and on which there remained unpaid a balance of \$291.80, as shown on summary of liabilities, "Exhibit B—Trade Accounts Payable," heretofore set forth.

Exhibit "C" as aforesaid consists of sundry accounts payable amounting to \$18,724.40 and payments made thereon by Multnomah Hotel Company since January, 1913, in the sum of \$16,484.29, and on which there remained unpaid a balance of \$2,240.11, as shown on summary of liabilities, "Exhibit C—Sundry Accts. Payable," heretofore set forth.

Exhibit "D" forming a part of said statement is in words and figures as follows, to-wit:

“EXHIBIT D”

BILLS PAYABLE

January 16, 1913.

1912		Amount	Interest	Paid	Check No.
May 8	First National Bank	50000			(Paid by note
8	“	43250			(of \$100,000
13	“	3600			(given First
13	“	5000		100000	(Nat'l Bank
13	“	5000			(by the R. R.
13	“	5000			(Thompson
13	“	5000			(Estate Co.
13	“	5000			
13	“	5000			

92

1913

Jan. 13

“

11000

\$142850.

\$420 90

43270 90

1

1912

Oct. 14 M. Seller & Co.
Int to Apr 14 '13

13821 67 418 52 2500 453
1740 19 866
10000 Notes given
by New Co.

1912

Feb. 3 Henry Weinhard Estate
Int @ 6% to May 13

1500 115

Mar. 6 Henry Weinhard Estate
Int @ 6% to May 13

4500 320 25

Dec. 5 Burley & Tyrell

500)
500) Interest
500) Waives
500)

2000 77

Dec. 5 National Cash Regis. Co.

1425 none

175 276
175 583
175 760
175 994

250 Credit A/c
Register
Ret'd

1912					
Oct. 26	Graves Music Co.	1080	4 80	1084 80	Paid by new cont.
1913					
Jan. 7	Marshall Wells Hdw. Co.	200	1 50	201 50	280
Jan. 7	"	200	2 80	202 80	579
Jan. 7	"	253 15	5 20	258 35	816
		167829 82	1288 97	162208 54	
Amounts Unpaid		1288 97		6910 25	
		169118 79		169118 79	

ACCOUNTS UNPAID:	Amount	Interest
Henry Weinhard Estate	1500	115
“	4500	320 25
National Cash Reg.—bal.	475	
	<hr/> 6475	<hr/> 435 25
	435 25	
	<hr/> \$6910 25”	

Exhibit “E,” consisting of sundry accounts receivable, on which there was due January 16, 1913, \$3148.58 and on which there had been collected by the Thompson Estate Company \$1247.43, leaving balance due of \$1901.15.

Exhibit “F,” consisting of an itemized statement of accounts receivable from guests, together with credits thereon, upon which there was due the Hotel Company \$11,234.47, and on which collections are shown in the sum of \$8225.77, leaving unpaid \$3008.70.

Exhibit “G” attached to said itemized statement as aforesaid is in words and figures as follows, to-wit:

EXHIBIT “G”

“FOR AND IN CONSIDERATION OF \$1.00 to it in hand paid by THE R. R. THOMPSON ESTATE COMPANY, a corporation organized and existing under the laws of the State of California, receipt of which is hereby acknowledged, I. GEVURTZ & SONS, a corporation organized under the laws of the State of Oregon, the owner of all of the common capital stock of MULTNOMAH HOTEL COMPANY,

a corporation organized under the laws of the State of Oregon, DOES HEREBY GIVE AND GRANT unto The R. R. Thompson Estate Company the sole and exclusive right, privilege and option for the period of fifteen days from this date to purchase all of the common and preferred stock of said Multnomah Hotel Company now issued, outstanding, subscribed for or contracted to be sold, for the sum of \$175,000.00, Gold Coin of the United States of America, to be paid for in cash, if this said option shall be exercised, upon delivery of said stock to The R. R. Thompson Estate Company, or to whomever it may authorize the same to be transferred; the said I. Gevurtz & Sons to show proper authorization by resolution of its Board of Directors for such purpose.

“The R. R. Thompson Estate Company shall have the right in paying said \$175,000.00, in consideration for said stock, to apply the same towards the payment of the indebtedness of said Multnomah Hotel Company to the First National Bank of Portland, Oregon, and to all other creditors of said company to the extent of said sum of \$175,000.00, and any and all other liabilities or indebtedness of said Multnomah Hotel Company up to the date of the transfer of stock shall be paid, satisfied and discharged by I. Gevurtz & Sons, provided, however, that if said I. Gevurtz & Sons shall not be in position to pay the same immediately, as the same becomes due, the R. R. Thompson Estate Company will advance necessary moneys to pay and discharge the same for said I. Gevurtz & Sons upon the execution of its promissory note to the R. R. Thompson Estate Company for

all said sums of money so required, with interest at the rate of 6%, payable six months from the first day of January, 1913, provided, however, that said amounts in the aggregate shall not exceed the sum of \$35,000.00, and provided, further, that all sums of money received by the Multnomah Hotel Company after said The R. R. Thompson Estate Company shall take possession thereof, realized from the payment of the outstanding book accounts and bills and accounts receivable due up to the first day of January, 1913, shall be applied by the R. R. Thompson Estate Company towards the payment of the amounts advanced by it to I. Gevurtz & Sons on its promissory note aforesaid.

“The said I. Gevurtz & Sons SHALL FURTHER WARRANT AND GUARANTEE said The R. R. Thompson Estate Company against any and all indebtedness and liabilities of said Multnomah Hotel Company over and above the aggregate amounts of \$175,000.00, consideration of the purchase price of the stock, and \$35,000.00, to be advanced by it in payment and liquidation of the obligations of said Hotel in excess of the purchase price of the stock, and SHALL INDEMNIFY The R. R. Thompson Estate Company against all further claims or demands, actions, damages, liabilities, suits, fines, liens, contracts or indebtedness of any character whatsoever, either due to I. Gevurtz & Sons, directly or indirectly, or to any other person, firm or corporation arising out of and incurred in the operation of said Multnomah Hotel, from the time of its beginning to the date of delivery of possession.

“It being the intention that in selling all of the com-

mon and preferred stock of the corporation to said The R. R. Thompson Estate Company for the sum of \$175,000.00, as aforesaid, the said Thompson Estate Company shall thereby obtain good title to all of the property and assets of said Multnomah Hotel Company, free and clear of all claims, demands, liabilities, liens, or indebtedness of any character or nature whatsoever, and that any and all other such debts, liabilities, liens or indebtedness shall be assumed and paid by said I. Gevurtz & Sons, and the advance by The R. R. Thompson Estate Company of the additional sum of \$35,000.00 shall only be as a matter of accommodation to I. Gevurtz & Sons, and shall not be any acknowledgment of any assumption by said Thompson Estate Company of any further liabilities, or for the payment of any greater sum for the assets of the Multnomah Hotel Company than represented by the purchase price of the common and preferred stock.

“IT BEING FURTHER UNDERSTOOD AND AGREED that the rental due from Multnomah Hotel Company to The R. R. Thompson Estate Company for the month of December, 1912, shall be considered as an obligation and indebtedness of the Hotel Company, and shall be deducted from the payment of the purchase price of the stock, AND FURTHER that the rental becoming due on the first day of January, 1913, shall be assumed and paid by the Multnomah Hotel Company to The R. R. Thompson Estate Company after the new management shall take possession.

“IN WITNESS WHEREOF, I. Gevurtz & Sons have caused this instrument to be executed by its presi-

dent, and its corporate seal affixed by authority of its Board of Directors, on the 10th day of January, 1913.

I. GEVURTZ & SONS (Seal)

By (Sgd) Philip Gevurtz
President"

Witnessed by:

(Sgd) Cecil H. Bauer

(Sgd) J. L. Potts

Exhibit "II" attached to said itemized statement as aforesaid is in words and figures as follows, to-wit:

"EXHIBIT II"

\$35,000.00 Portland, Oregon, January 16, 1913.

On or before July 1, 1913, after date, without grace, I. GEVURTZ & SONS promises to pay to the order of THE R. R. THOMPSON ESTATE COMPANY, at Portland, Oregon, THIRTY-FIVE THOUSAND DOLLARS, in Gold Coin of the United States of America, of the present standard value, with interest thereon in like Gold Coin at the rate of six per cent per annum from date until paid. Interest to be paid at maturity. And in case suit or action is instituted to collect this note, or any portion thereof, I. Gevurtz & Sons promises and agrees to pay, in addition to the costs and disbursements provided by statute, such additional sum, in like Gold Coin, as the Court may adjudge reasonable, for attorney's fees to be allowed in said suit or action.

I. GEVURTZ & SONS (Seal)

By (Sgd) Philip Gevurtz
President

I. GEVURTZ & SONS

By (Sgd) Louis Gevurtz

Secretary"

Exhibit "I" attached to said itemized statement as aforesaid is in words and figures as follows, to-wit:

"EXHIBIT I"

I. GEVURTZ & SONS, a corporation, by Philip Gevurtz, president, and Louis Gevurtz, secretary, being thereunto duly authorized by and in pursuance of a resolution of the Board of Directors of said company, duly adopted at a special meeting of said Board of Directors held on the 16th day of January, A. D. 1913, and in consideration of One Dollar in hand paid, and other good considerations received from **THE R. R. THOMPSON ESTATE COMPANY**, a corporation, receipt whereof is hereby acknowledged, **DOES HEREBY AGREE**, and by these presents guarantees unto The **R. R. Thompson Estate Company**, and its successors or assigns, that it will indemnify and save the said **R. R. Thompson Estate Company**, and its successors and assigns, free and harmless against any and all indebtedness and liabilities of the **MULTNOMAH HOTEL COMPANY**, a corporation, and against all claims or demands, actions, damages, liabilities, suits, fines, liens and contracts of indebtedness of any character whatsoever, either due to **I. Gevurtz & Sons**, directly or indirectly, or to any other person, firm or corporation arising out of or incurred in the operation of said **Multnomah Hotel Company** from the time of its beginning

to the date of delivery of possession of all of the common and preferred stock of said Multnomah Hotel Company by I. Gevurtz & Sons to The R. R. Thompson Estate Company, over and above the sum of \$210,000.00, being the aggregate amount of the purchase price of the said common and preferred stock, TO-WIT: \$175,000.00 and the amount of \$35,000.00 this day loaned and advanced to I. Gevurtz & Sons, all of which said \$210,000.00 is to be applied upon and paid in liquidation of the debts and obligations of said Hotel Company, it having been agreed under and by virtue of the terms of that certain option given by I. Gevurtz & Sons to The R. R. Thompson Estate Company for the sale of all of the common and preferred stock of the Hotel Company, and IN CONSIDERATION THEREOF, that I. Gevurtz & Sons shall so indemnify and save the said R. R. Thompson Estate Company and its successors and assigns from the against all of such claims, demands, indebtedness, liabilities, actions, damages, suits, fines, liens and contracts of indebtedness of any character whatsoever. And the said I. Gevurtz & Sons by these presents binds itself to pay any of such indebtedness or liabilities which may remain unpaid, or be in excess of the amount of \$210,000.00, to be applied as hereinbefore provided, less any and all credits on the note of \$35,000.00, to which the said I. Gevurtz & Sons may be entitled on account of collection of any book accounts or accounts and bills receivable due to the Hotel Company up to this date, whenever the same have been collected, but that if the same, or any part thereof, is uncollectible, or the payment thereof is delayed to any unrea-

sonable time, the same shall not be considered as postponing the liability of I. Gevurtz & Sons upon its guaranty for any excess of indebtedness presented and required to be paid by the Multnomah Hotel Company.

“IT BEING AGREED AND UNDERSTOOD that the R. R. Thompson Estate Company, transferees and assignees of the common and preferred stock of the Multnomah Hotel Company, shall assume the contract made and entered into by and between the Multnomah Hotel Company and H. C. Bowers, as manager, and all other legal and valid contracts of employment, but that I. Gevurtz & Sons shall not be liable under any contract for the purchase of automobile busses, and further shall not be liable for the rental due to The R. R. Thompson Estate Company for the month of January, 1913.

Dated this 16th day of January, A. D. 1913.

I. GEVURTZ & SONS

By (Sgd) Philip Gevurtz

President

I. GEVURTZ & SONS

By (Sgd) Louis Gevurtz

President”

Exhibit “J” attached to said itemized statement as aforesaid is in words and figures as follows, to-wit:

"EXHIBIT J"

SPECIAL MEETING OF THE BOARD OF
DIRECTORS OF I. GEVURTZ & SONS.

"A special meeting of the Board of Directors of I. GEVURTZ & SONS having been duly called by the president by notice in writing, to all of said directors as provided in the by-laws, for the purpose of considering the sale and transfer of all of the common and preferred stock of Multnomah Hotel Company to The R. R. Thompson Estate Company, a corporation, and to guarantee to the said Estate Company against all claims or demands, liabilities, or indebtedness of the said Hotel Company beyond the amount of the purchase price of the stock, and for the execution of a note of the corporation to The Estate Company for moneys to be advanced by it to pay the balance of the indebtedness of the Hotel Company, the following directors, TO-WIT: Philip Gevurtz, Alex Gevurtz, Matthew Gevurtz and Louis Gevurtz, being present in person, and the remaining director, I. Gevurtz, being absent from the city, and having waived notice of the meeting in writing, and consented to the same, and having ratified all of the actions taken at said meeting, the said meeting was held at the office of the company on the 16th day of January, 1913, at the hour of two o'clock P. M., the time appointed in the notice for the said meeting.

"Philip Gevurtz, president, presided at the meeting, and Louis Gevurtz, secretary, acted as such. The following proceedings were had:

"Philip Gevurtz offered the following resolution,

which having been duly seconded by Louis Gevurtz, after discussion, was unanimously adopted:

“WHEREAS this company is the owner and holder of all of the common stock of Multnomah Hotel Company, a corporation organized and existing under the laws of the State of Oregon, TO-WIT: 2000 shares of the par value of \$100.00 per share, 8 shares of which are now in the individual names of I. Gevurtz, C. Gevurtz, Philip Gevurtz, Lillie Gevurtz, Alex Gevurtz, Matthew Gevurtz, S. Misch and Louis Gevurtz, for the purpose of maintaining the corporate existence of the Multnomah Hotel Company, but in truth and in fact the said stock is owned by I. Gevurtz & Sons, and the said I. Gevurtz & Sons is also the owner and holder of 1450 shares of the preferred stock of the said Multnomah Hotel Company, and W. J. Van Schuyver & Co. is the owner of 50 shares, all of the par value of \$100.00 per share, and the said 2000 shares of the common stock is all of the common stock authorized and issued by the Multnomah Hotel Company, and which said 1500 shares of the preferred stock is all of the preferred stock authorized and issued by said Multnomah Hotel Company, and there is no further unissued, common or preferred stock, nor any treasury stock of said Multnomah Hotel Company, AND

“WHEREAS, all of the said stock, both common and preferred, has been fully paid for, and there is no liability of any of the stockholders for any unpaid portion thereof, and the same is fully and adequately paid up and non-assessable, AND

“WHEREAS, the said Multnomah Hotel Com-

pany is indebted to divers and various banks, corporations, firms and individuals in the sum of about \$———, and on account of lack of capital and business conditions now existing in the City of Portland, and the necessity of I. Gevurtz & Sons for further capital to operate its own business, and it is unable to obtain any further money or credit for either the Hotel Company or its own business, and will require a large amount of money immediately to liquidate its liabilities, which it is unable to obtain, and in the judgment of the directors of I. Gevurtz & Sons it is absolutely necessary to sell and dispose of all of the stock owned by it in said Multnomah Hotel Company in order to obtain money to liquidate its liabilities and to continue its own business, AND

“WHEREAS, The R. R. Thompson Estate Company, a corporation, has offered to purchase the said stock of the Multnomah Hotel Company and to take over the said business, and in pursuance thereof I. Gevurtz & Sons, by its president and secretary, did, on the 10th day of January, 1913, make, execute and deliver under the seal of this corporation, to said R. R. Thompson Estate Company an option for the period of fifteen days from said date for the purchase of all of the common and preferred stock of said Multnomah Hotel Company now issued, outstanding, subscribed for or contracted to be sold, for the sum of \$175,000.00, Gold Coin of the United States of America, to be paid for in cash, upon delivery of said stock to The R. R. Thompson Estate Company, or to whomsoever it might authorize the same to be transferred, if said Es-

tate Company should exercise its said option, all of the terms and conditions for said sale being fully set out and contained in said option, and the said The R. R. Thompson Estate Company has notified this company that it has exercised its right to so purchase all of the common and preferred stock of the Multnomah Hotel Company on the terms and conditions in said option fully set out and contained, and is ready and willing to pay over the said sum of \$175,000.00, and to accept the delivery of all of the common and preferred stock of said Multnomah Hotel Company, AND

“WHEREAS, this company has endeavored to sell the assets of the Multnomah Hotel Company, or the common and preferred stock, to other parties; and the offer of The R. R. Thompson Estate Company is the best offer the directors have been able to obtain, and in the judgment of the directors, under the conditions and the emergencies existing, it is to the advantage and for the best interests of this corporation that the offer of said R. R. Thompson Estate Company be accepted, NOW THEREFORE BE IT

“RESOLVED: That the directors of I. Gevurtz & Sons HEREBY RATIFY AND CONFIRM the action of the president and secretary in making and executing, on behalf of this corporation, its option to The R. R. Thompson Estate Company, AND BE IT FURTHER

“RESOLVED: That I. Gevurtz & Sons do, AND IT IS HEREBY authorized and directed to sell to the said R. R. Thompson Estate Company all of the common stock of the Multnomah Hotel Company

owned by it, to-wit: 2000 shares, of the par value of \$100.00 per share, and all of the preferred stock of said Multnomah Hotel Company owned by it TO-WIT: 1450 shares, of the par value of \$100.00 per share, and to obtain and procure the 50 shares of the preferred stock now owned and held by W. J. Van Schuyver & Co. and to sell same to The R. R. Thompson Estate Company, together with its own stock, being in all the total amount of common and preferred stock authorized and issued, the same being fully paid up and non-assessable, and that the president and secretary of this company be, and they are hereby authorized and directed to endorse all of the common and preferred stock owned and held by it, and to procure the proper endorsement by the other individual members and stockholders of the corporation of I. Gevurtz & Sons now holding each one share of the capital stock, and also to obtain the assignment and transfer of the 50 shares of the preferred stock held by W. J. Van Schuyver & Co., and to deliver all of said stock, TO-WIT: 2000 shares of the common stock, and 1500 shares of the preferred stock, to the said R. R. Thompson Estate Company forthwith, upon the payment of this company of the consideration therefor, TO-WIT: \$175,000.00, AND

“WHEREAS, one of the conditions of the sale of the said stock to the said The R. R. Thompson Estate Company was that I. Gevurtz & Sons should pay all liabilities or indebtedness of said Multnomah Hotel Company up to the date of the transfer of the stock, and shall satisfy and discharge the same, and that if

said I. Gevurtz & Sons should not be in position to pay the same immediately, as the same becomes due, The R. R. Thompson Estate Company would advance the necessary moneys to pay and discharge the same for said I. Gevurtz & Sons upon the execution of its promissory notes to The R. R. Thompson Estate Company for all such sums of money so required, with interest at the rate of 6% per annum, payable six months from the first day of January, 1913, provided, however, that said amount in the aggregate should not exceed the sum of \$35,000.00. AND PROVIDED FURTHER, that all sums of money received by Multnomah Hotel Company after said The R. R. Thompson Estate Company should take possession thereof realized from the outstanding book accounts and bills and accounts receivable due up to the first day of January, 1913, should be applied when, and only if collected by The Thompson Estate Company, towards the payment of the amounts advanced by it to I. Gevurtz & Sons on its promissory note aforesaid, AND FURTHER, that the said I. Gevurtz & Sons should warrant and guarantee said The R. R. Thompson Estate Company against any and all indebtedness and liabilities of said Multnomah Hotel Company over and above the aggregate amounts of \$175,000.00 consideration of the purchase price of the stock, and \$35,000.00 to be advanced by said R. R. Thompson Estate Company to it in payment and liquidation of the obligations of said Multnomah Hotel Company in excess of the purchase price of the stock, and should indemnify the said R. R. Thompson Estate Company against all further claims

or demands, actions, damages, liabilities, suits, fines, liens, contracts or indebtedness of any character whatever, either due to I. Gevurtz & Sons directly or indirectly, or to any other person, firm or corporation arising out of or incurred in the operation of said Multnomah Hotel Company from the time of its beginning to the date of delivery of possession thereof to said The R. R. Thompson Estate Company, it having been the intention that in selling all of said common and preferred stock to said R. R. Thompson Estate Company should thereby obtain good title to all of the property and assets of said Multnomah Hotel Company, free and clear of all claims, demands, liabilities, liens or indebtedness of any character or nature whatsoever, and that any and all other such demands, liabilities, liens or indebtedness should be assumed and paid by I. Gevurtz & Sons, and that the advance to said I. Gevurtz & Sons of the additional sum of \$35,000.00 upon its promissory note, should only be considered as a matter of accommodation, and not any acknowledgment of any assumption by said R. R. Thompson Estate Company of any further liability or for the payment of any greater sum for the assets of the Multnomah Hotel Company than represented by the purchase price of the common and preferred stock, **NOW THEREFORE BE IT FURTHER**

“RESOLVED: That the president and secretary of this company be, and they are hereby authorized and directed to make, execute and deliver to The R. R. Thompson Estate Company its promissory note for the sum of \$35,000.00, with interest at the rate of six per

cent per annum, payable six months from the first day of January, 1913, AND FURTHER

“That out of the sums of \$175,000.00 paid by The R. R. Thompson Estate Company for the said common and preferred stock, and the sum of \$35,000.00, advanced to said I. Gevurtz & Sons upon the said promissory note, the said R. R. Thompson Estate Company shall pay the whole thereof to the various creditors of said Multnomah Hotel Company as far as the same will satisfy the indebtedness, and that the President and Secretary be, and they are hereby authorized and directed, on behalf of this corporation to make and execute such guaranty and indemnification as the said R. R. Thompson Estate Company may require and demand, protecting it against all further claims or demands, actions, damages, liabilities, suits, fines, liens, contracts or indebtedness of any character whatsoever, either due to I. Gevurtz & Sons directly or indirectly, or to any other firm or corporation, arising out of or incurred in the operation of said Multnomah Hotel from the time of its beginning to the date of delivery of possession to the R. R. Thompson Estate Company, over and above the aggregate sum of \$210,000.00 to be paid out and applied by said R. R. Thompson Estate Company upon the indebtedness of said Hotel Company aforesaid. AND BE IT FURTHER

“RESOLVED: That the rental due from Multnomah Hotel Company to The R. R. Thompson Estate Company for the month of December, 1912, shall be, and is hereby declared to be one of the liabilities which is to be paid out of the proceeds of the purchase

price of the stock, and that the rental for the month of January, 1913, shall be assumed by the R. R. Thompson Estate Company and not considered as an obligation or indebtedness of the Multnomah Hotel Company, AND FURTHER, that any and all indebtedness and liability incurred by the Hotel Company since the first day of January, 1913, up to the date of the delivery of possession of said stock to the R. R. Thompson Estate Company over and above the income from said hotel, paid and applied thereon, and after applying all collections, when and if made, of the outstanding book accounts and accounts and bills receivable from the first day of January, 1913, shall be considered as a liability to be assumed and paid by I. Gevurtz & Sons, and included in the guaranty to be given to The R. R. Thompson Estate Company, as hereinbefore provided. AND BE IT FURTHER

“RESOLVED: That the said option in writing shall be and it is hereby adopted as a binding and valid contract between The R. R. Thompson Estate Company and I. Gevurtz & Sons, upon the payment of the purchase price, TO-WIT: \$175,000.00 by said R. R. Thompson Estate Company, and shall have the same force and effect as a contract duly entered into between the parties thereto, pertaining and relating to all matters therein contained. AND BE IT FURTHER

“RESOLVED: That a copy of the minutes of this meeting duly certified by the secretary of this company, be furnished to The R. R. Thompson Estate Company.

"There being no further business on motion, the meeting adjourned.

(Signed) Philip Gevurtz
President

(Signed) Louis Gevurtz
Secretary."

**"STATE OF OREGON
COUNTY OF MULTNOMAH—ss.**

I, Louis Gevurtz, the duly elected, qualified and acting secretary of I. GEVURTZ & SONS, a corporation, HEREBY CERTIFY that the foregoing is a full, true and complete copy of the minutes of a special meeting of the Board of Directors of I. Gevurtz & Sons held at the office of the Company on the 16th day of January A. D. 1913, and of the whole thereof.

(Signed) LOUIS GEVURTZ
Sec'y

(SEAL)

I. Gevurtz & Sons"

"Louis Gevurtz, Secretary,

I. GEVURTZ & SONS
Multnomah Hotel,
Portland, Oregon.

I HEREBY ACKNOWLEDGE receipt of notice of special meeting of the directors of I. GEVURTZ & SONS to be held January 16th, nineteen hundred and thirteen at two PM and consent thereto and hereby ratify and all action taken at said meeting.

I. GEVURTZ."

STATE OF OREGON
COUNTY OF MULTNOMAH—ss.

I, Louis Gevurtz, Secretary of I. Gevurtz & Sons a corporation, hereby certify that the foregoing is a full, true and complete copy of telegram received by me as secretary of said I. GEVURTZ & SONS, from I. Gevurtz, on the 15th day of January, 1913, and the whole thereof.

(Signed) Louis Gevurtz

(SEAL)

Sec'y

I. Gevurtz & Sons

COURT: There is \$1500 here besides that \$4500.

Mr. Teiser: Yes. That has been paid since that time. \$2000 has been paid since that time. There were two notes. The \$1500 note has been paid, and \$1000 of the \$4500 note has been paid.

COURT: You are only relying on the one note?

Mr. Teiser: Oh, absolutely. We are only suing on the \$3500.

COURT: What is the object of amending it?

Mr. Teiser: There was filed, after that claim was allowed, in fact after decision of the referee, an amended claim in bankruptcy by the R. R. Thompson Estate Company in the I. Gevurtz & Sons matter. The amended claim was filed by stipulation. I shall also introduce the stipulation between the attorney for the trustee and the attorney for the R. R. Thompson Estate Company. The amended claim adopts all of the exhibits filed in the original claim as though they were filed and attached thereto. The amended claim contains many additional allegations, among them the al-

legation that all of the payments made by the R. R. Thompson Estate Company for the Multnomah Hotel Company stock were applied to the payment of indebtedness for which I Gevurtz & Sons, the bankrupt, were liable, and said I Gevurtz & Sons obtained the benefit of all of said payments, etc.

Mr. McCurtain: I want to save an exception on the original objection, if your Honor please, that there is no privity between I. Gevurtz & Sons and the Thompson Estate Company or the Multnomah Hotel Company and the plaintiffs in this case; that the claim for whatever it is worth could not in any way bind the Thompson Estate Company to the indebtedness of the Weinhard Brewery, because of the fact that the Weinhard Brewery were not parties to this bankruptcy proceeding or to the claim or its allowance or rejection.

COURT: Very well. The objection is overruled and your exception allowed.

Mr. McCurtain: I assume, your Honor, in all these objections, exception is allowed unless your Honor so states?

COURT: Yes.

Which said Stipulation was marked Exhibit "F" and is in words and figures as follows, to-wit:

"In the District Court of the United States for the
District of Oregon

In the Matter of I. Gevurtz)	
& Sons, a corporation,)	IN BANKRUPTCY
Bankrupt)	

"It is hereby stipulated by and between Reed & Bell, attorneys for the trustees of I. Gevurtz & Sons,

bankrupt, and Bauer & Greene and A. H. McCurtain, attorneys for The R. R. Thompson Estate Co. that an amended proof of claim of said R. R. Thompson Estate Co. against I. Gevurtz & Sons, bankrupt, for the sum of \$57,566.04 may be filed with the Referee in Bankruptcy in the above entitled matter as a general claim, and that the order of the Referee allowing the claim of said The R. R. Thompson Estate Co., dated the 11th day of November, 1913, shall apply to the proof of claim as amended as though said amended proof of claim had been the original proof of claim. And that the exhibits attached to the original proof of claim, and referred to in the amended proof of claim be considered as attached to the amended proof of claim and made a part thereof.

REED & BELL

Attorneys for the Trustees of I. Gevurtz & Sons, bankrupt.

BAUER & GREENE and A. H. McCURTAIN

Attorneys for The R. R. Thompson Estate Co.

Mr. Teiser: I shall now offer in evidence, your Honor, and ask to be introduced memorandum of authorities and brief of R. R. Thompson Estate Company in support of its claim in the bankruptcy proceedings. It is the brief of attorneys for the R. R. Thompson Estate Company.

Same objection.

Which said Memorandum of Authorities was marked Exhibit "G" and is in words and figures as follows:

**"IN THE MATTER OF I. GEVURTZ & SONS
Bankrupt**

**BRIEF OF ATTORNEYS FOR THE R. R.
THOMPSON ESTATE COMPANY**

"For the past several years of the existence of I. Gevurtz & Sons it was engaged to a great extent in taking leases on buildings for hotel and lodging house purposes, furnishing the same and operating them until they could make an advantageous sale of them. In most cases they incorporated subsidiary companies to operate such hotel or lodging house. While the corporations were apparently separate and distinct from the parent corporation I. Gevurtz & Sons, in fact I. Gevurtz & Sons owned all of the stock of each of the said corporations and really owned the entire assets of each corporation, simply using the corporate form as a matter of convenience and safety. This feature of its business became so extensive and so many questions arose in the sale of the various subsidiary corporations by the transfer of the stock and as to the protection of purchasers of the stock against liabilities of the subsidiary corporations, which I. Gevurtz & Sons were called upon to guarantee and indemnify the purchasers against, that the question arose as to whether they had the authority to do so under their articles of incorporation. Accordingly at the annual meeting of I. Gevurtz & Sons, held in January, 1912, the articles of incorporation were amended as follows: "To purchase, own, sell, and deal in shares of stock, bonds, debentures and obligations of public and other private corpora-

tions, and to guarantee said stocks, bonds, debentures and obligations of other corporations." The sole and only purpose of this amendment was to authorize and protect I. Gevurtz & Sons in dealing with the stock of subsidiary corporations and selling the same, to guarantee the purchasers and indemnify them against claims of indebtedness that might be outstanding against the corporations.

"During the year 1912 I. Gevurtz & Sons, having acquired the lease on the Multnomah Hotel, and having completely furnished and equipped it, took in payment thereof all of the common stock of the corporation, to-wit: \$200,000.00 of the par value of \$100.00 per share, and 1450 shares out of the 1500 shares of the preferred stock of said company, of the par value of \$100.00, W. J. VanSchuyver & Co. having been issued the other 50 shares of preferred stock in payment of merchandise. In order to furnish the hotel I. Gevurtz & Sons were obliged to purchase all of the furniture and equipments in its own name and pay for same, and in order to do so borrowed large sums of money from the First National Bank of Portland, Oregon, and other banks. In addition to this it required a large sum of money and credit to stock up the hotel with provisions and also to meet the pay roll until the business of the hotel was on a sound footing. Owing to local conditions and the great expense of fitting up the hotel and getting it started properly I. Gevurtz & Sons were drained of all money and resources for its own business, and could not borrow any more money from the First National Bank or any other institution. In the meanwhile I. Gevurtz & Sons

had contracted for a lease on the 12-story building at Fifth and Alder Street, Portland, Oregon, and required a large amount of money to fit up the same and procure stock with which to operate its business therein. It could neither obtain the stock of merchandise necessary, nor money, on account of the heavy drain upon it caused by the Multnomah Hotel, and found itself in the position where it would have to either abandon the hotel and sacrifice all the money it had invested in it, or suspend its own business. It immediately set about to find a purchaser for the Multnomah Hotel, but found it impossible to sell it at all. At this time it was several months in arrears in its rent to The R. R. Thompson Estate Co., and as a last resort appealed to the Thompson Estate Co. to buy the hotel under a threat that unless it did so they would be compelled to suspend the operation of the hotel and leave the building on the hands of the Thompson Estate Co.

"R. O. Yates, the manager and secretary of the Thompson Estate Co., came to Portland and investigated conditions and finally took an option from I. Gevurtz & Sons on or about the 1st day of January, 1913, upon the purchase of all of the common and preferred stock of the Multnomah Hotel Co. for \$175,000.00. This was by far the best offer received by I. Gevurtz & Sons for the sale of the hotel. The exigencies of I. Gevurtz & Sons and the fact that this was the best offer is set out in the recitals of the records of the special meeting of the directors of I. Gevurtz & Sons, Exhibit J of the proof of claim of The R. R. Thompson Estate Co. vs. I. Gevurtz & Sons, and is as follows:

“Whereas, the said Multnomah Hotel Company is indebted to divers and various persons, corporations, firms and individuals in the sum of about \$. and on account of the lack of capital, and business conditions now existing in the City of Portland, and the necessity of I. Gevurtz & Sons for further capital to operate its own business, and it is unable to obtain any further money or credit either for Multnomah Hotel Company or its own business, it will require a large amount of money immediately to liquidate its liabilities, which it is unable to obtain, and in the judgment of the directors of I. Gevurtz & Sons it is absolutely necessary to sell and dispose of all of the stock owned by it in said Multnomah Hotel Company, in order to obtain money to liquidate its liabilities, and to continue its own business. * * *

“Whereas, this company has endeavored to sell the assets of the Multnomah Hotel Company, or the common and preferred stock to other parties, and the offer of The R. R. Thompson Estate Co. is the best offer the directors have been able to obtain, and in the judgment of the directors, under the conditions and the emergencies existing, it is to the advantage and to the best interests of this corporation that the offer of said R. R. Thompson Estate Co. shall be accepted, now therefore * * *

“It must be borne in mind that both I. Gevurtz & Sons and Multnomah Hotel Company were doing their banking business with the First National Bank, but the Multnomah Hotel Company kept no separate account in the First National Bank and all of the accounts and deposits were kept under the name of I. Gevurtz & Sons, each concern drawing as it needed

money and "robbing Peter to pay Paul." If I. Gevurtz needed money they took it from the Multnomah Hotel Company and vice versa. And the fact that the Multnomah Hotel Company was constantly running behind in its operating expenses, to say nothing of failure even to pay interest on the notes to the First National Bank, and the business of I. Gevurtz & Sons being practically suspended on account of moving into its new location, both the Hotel Company and I. Gevurtz & Sons were in desperate straits for ready money. If this sale had not been made both the Hotel Company and I. Gevurtz & Sons would have suspended and gone into bankruptcy in January, 1913.

"One of the conditions of the purchase of stock by The R. R. Thompson Estate Co. from the Multnomah Hotel Company was that I. Gevurtz & Sons should guarantee and indemnify the Thompson Estate Co. against all liabilities and indebtedness of the Multnomah Hotel Company. From an examination made of the books by Mr. Yates and his expert, owing to the confused condition of the books, they estimated as nearly as possible, that the liabilities amounted to about \$210,000.00. Of this amount \$143,000.00 was due to the First National Bank on joint notes signed by Multnomah Hotel Company and I. Gevurtz & Sons. As a matter of fact none of the money borrowed from the bank, for which these notes were given went into the Multnomah Hotel Company, except possibly the sum of \$11,000.00, borrowed on the 11th day of May, 1913. This money was borrowed by I. Gevurtz & Sons to pay for the furniture and equipments they put into the hotel,

and for which they took the whole issue of common and preferred stock of the Hotel Company. I. Gevurtz & Sons, however, were required by the bank to not only sign the note themselves but obtain the signature of Multnomah Hotel Company, and bring all of the stock of the Multnomah Hotel Company as surety. The note given to the bank was a direct obligation of I. Gevurtz & Sons and one for which the Multnomah Hotel Company was not liable, except that indirectly it obtained the benefit of it, but had paid fully for it by the issue of the capital stock to I. Gevurtz & Sons.

"The other indebtedness was due to various and sundry firms and corporations.

"The R. R. Thompson Estate Co. paid over the sum of \$175,000.00 to I. Gevurtz & Sons by taking up the notes above mentioned, at the First National Bank, and paying other creditors. It also paid out the sum of \$35,000.00, the balance of the amount of indebtedness shown on the books of the Multnomah Hotel Company, as a matter of accommodation, and took the note of I. Gevurtz & Sons for same, payable six months after date. I. Gevurtz & Sons then guaranteed any further liabilities by the guarantee dated January 16, 1913, marked Exhibit I, attached to the proof of claim of The R. R. Thompson Estate Co. vs. I. Gevurtz & Sons.

"After a full audit of the books, and receipt of all claims of indebtedness against the Multnomah Hotel Company it developed that instead of being \$35,000.00, as evidenced by the note, it was about \$60,000.00, and it is for the payment of the note of \$35,000.00 and the balance under the guaranty of I. Gevurtz & Sons that

the proof of claim of The R. R. Thompson Estate has been filed in this matter.

“We have gone into the history of this case with some particularity and are willing to substantiate all of the facts by proper proof if required, as a basis for the application of the general principles and rules of law which we now desire to cite in connection with this matter.

“Assuming this statement to be the actual facts we can therefore assert that:

“First: I. Gevurtz & Sons has received the fruits of the contract and retained the consideration for it; that it received the benefit of all of the payments made by The R. R. Thompson Estate Co. under this contract.

“Second: That I. Gevurtz & Sons received the greater portion of the proceeds of the transaction.

“Third: That the guaranty was not a naked one, but was coupled with an interest, and was really more for the benefit of I. Gevurtz & Sons than for Multnomah Hotel Company.

“Fourth: That I. Gevurtz & Sons retained the valuable consideration from R. R. Thompson Estate Co. for which it assumed liability under the guaranty.

“Fifth: That the contract has been fully performed by R. R. Thompson Estate Co. and cannot be restored to its former status or honestly dealt with otherwise than by a specific performance on the part of I. Gevurtz & Sons.

“We positively assert that even if the wording of the amendment to the articles of incorporation of I. Gevurtz & Sons was not broad enough to include obligations of

this character, or if by a strict and the very most narrow construction of the wording of said amendment it might be concluded that it did not have the effect we ascribe to it, we believe that the intention and purpose of the directors in adopting the amendment should control. But even aside from this, we contend that the broad powers given under the articles of incorporation 'generally to do any all things incidental, appropriate, proper or necessary to enable said company to carry on any of the enterprises or purposes above enumerated,' taken in connection with the practice and custom of this concern in incorporating subsidiary companies for the purpose of promoting its own business interests, and the general necessity and requirements of all purchasers of stock of subsidiary companies to require that the assets thereby acquired should be freed and cleared of all liens, obligations or liabilities, made the guaranteeing and indemnifying of purchasers against such obligations as much of an incident, proper and necessary to enable said company to carry on its enterprises or purposes as the implied warranty of the title of any merchandise it might sell.

"But if for the sake of argument it should become necessary to admit that the amendment was not broad enough to give the corporation power to execute the guaranty in question, we would contend in the first place that this would not affect the execution of the note, and that even without any such power in the articles of incorporation it had a right to become a guarantor in the ordinary course of its business and for the reason that it had received the proceeds and benefits of the transaction.

And furthermore, that having retained the fruits and benefit of the contract, and the contract having been fully complied with and performed on the part of The R. R. Thompson Estate Co., I. Gevurtz & Sons would be estopped from setting up the defense that it had no power to enter into the contract, or that it was prohibited by statute from so doing.

(Here follows a citation and discussion of authorities consisting of several pages.)

“We therefore beg to urge: First, that the amendment to the articles of incorporation is broad enough and the positive intent of same was for the very purpose of authorizing just such a transaction as this one; second, that even without this amendment, due to the custom of the corporation and the nature of its business, this act was one of the many which were considered incidental, appropriate, proper and necessary to enable the company to carry on the enterprises and purposes mentioned in the articles; third, that I. Gevurtz & Sons, and necessarily its successor, the trustee in bankruptcy, is estopped from denying the validity of the guaranty or avoiding it on account of ultra vires, for the reason that it received the benefit of the payments made by The R. R. Thompson Estate Co. and retained the fruits and consideration of it.

“In conclusion we would again call your attention to the fact that I. Gevurtz & Sons owned the stock and sold it. It received the consideration for it and was benefited to the extent at least of \$143,000.00, the amount it was obligated on the notes to the First National Bank,

and which the First National Bank could have collected from I. Gevurtz & Sons. In fact, it is a serious question in our minds whether the bank could have held the Multnomah Hotel Company on these notes, inasmuch as they were purely accommodation makers without any consideration whatever. The Multnomah Hotel Company, as you will remember, was incorporated in 1911 and all of the stock subscribed for by I. Gevurtz & Sons was fully paid up by the contract of I. Gevurtz & Sons fully to furnish and equip the hotel and deliver same free and clear of all liens or indebtedness. A year later, in May, 1912, I. Gevurtz & Sons, not having sufficient money to pay for the furniture and equipments which they placed in the hotel, were obliged to borrow it from the First National Bank, and the First National Bank, with over-abundance of caution, required I. Gevurtz & Sons to obtain the endorsement of the Multnomah Hotel Company to the notes and pledge all of the stock of the Multnomah Hotel Company as security. If the R. R. Thompson Estate Co. had not purchased the stock of the Multnomah Hotel Company when it did, both the Hotel Company and I. Gevurtz & Sons would have suspended at that time, and bankruptcy in both cases would have undoubtedly ensued. In such an event the liabilities of I. Gevurtz & Sons would have been \$143,000.00 greater than they are at the present, as the claim of the First National Bank on these notes would have been provable against I. Gevurtz & Sons, and even if they would have also been provable against Multnomah Hotel Company, which we doubt the assets of Multnomah Hotel Company in bankruptcy would have brought

very little, if anything, over and above the lien of the lessors of \$75,000.00 on the furniture as security for the rental. It will thus be seen that I. Gevurtz & Sons not only directly received the greater portion of the proceeds of the purchase price of this stock, but were greatly benefited by the transaction, and on all grounds of law, morals, right and justice they are estopped from setting up ultra vires as a defense to this action.

Respectfully submitted,

BAUER & GREENE and A. H. McCURTAIN.

Attorneys for The R. R. Thompson Estate Co.”

COURT: I will allow it to go in.

Mr. Teiser: I now introduce in evidence the order allowing the claim of the R. R. Thompson Estate Company signed by Chester G. Murphy, referee in bankruptcy, on November 21, 1913.

Same objection. Objection overruled. Exception allowed.

Which said order was marked Exhibit “H” and is in words and figures as follows:

“IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE DISTRICT
OF OREGON.

“In the Matter of I. GEVURTZ & SONS, BANK-
RUPT.

ORDER ALLOWING CLAIM OF R. R.
THOMPSON ESTATE COMPANY.

"At a Court of Bankruptcy held at Portland on the 11th day of November, A. D. 1913, before CHESTER G. MURPHY, Referee.

"This matter coming on for hearing upon objections filed by the Trustee to the allowance of the claim of R. R. Thompson Estate Company, heretofore filed herein for allowance in the sum of \$60,489.42, and briefs in opposition to and in support of said claim having heretofore been filed by counsel and examined, and counsel heard, and the matter taken under advisement,

"IT IS ORDERED that the said claim be, and the same hereby is allowed as a general claim against this estate in the sum of \$57,566.04, a reduction of \$2933.38 being made upon stipulation of parties filed herein.

"Briefly the facts upon which this claim is based are as follows:

"The Multnomah Hotel Company was formed as a subsidiary company of the bankrupt corporation just prior to the opening of the Multnomah Hotel in the City of Portland, Oregon, and Gevurtz & Sons, who held a lease on the Multnomah Hotel property and had installed furniture therein in large amount, took all of the stock of said hotel company in payment for said furniture and leasehold interest, and thereafter the Multnomah Hotel Company presumably operated the hotel as a separate entity. However, there was an interlocking of directors with Gevurtz & Sons, and the account

was carried practically all of the time in the name of I. Gevurtz & Sons.

“However, when money was borrowed from the First National Bank of Portland in the sum of approximately \$175,000.00, the stock of the Multnomah Hotel Company was hypothecated as collateral security therefor and the Multnomah Hotel Company, by Phil Gevurtz, its president, likewise joined in the execution of the note.

“Later the bankrupt corporation and its subsidiary company, the Multnomah Hotel Company, finding themselves in financial difficulties, on or about January 16th, 1913, turned over all of the stock and assets of the Multnomah Hotel Company to the R. R. Thompson Estate Company, the owner of the hotel property, for the sum of \$175,000.00 in cash and gave the note of I. Gevurtz & Sons for \$35,000.00, due on or before July 1st, 1913, to cover additional outstanding accounts of the Multnomah Hotel Company, which the Thompson Estate Company agreed to pay under an agreement with I. Gevurtz & Sons, duly executed, whereby, in addition to said \$35,000.00 covered by note in question, they would also pay additional bona fide claims that might be outstanding against said hotel, the exact amount of which could not at that time be fixed.

“In pursuance of said agreement, the stock of the Hotel Company was turned over to the Thompson Estate Company, together with \$35,000.00 note, and thereafter bona fide claims against the Hotel Company were paid by the Thompson Estate Company aggregating, as shown in their claim (and which includes the \$35,000.00),

the total sum of \$60,489.42, and for the return of these advances the claim is made and filed herein.

“The ‘Trustees’ objection thereto are based on the following grounds:

“1st. That the obligation is an independent obligation of the Multnomah Hotel Company, a corporation no longer in existence, and

“2nd. That I. Gevurtz & Sons had no corporate authority under its charter to guarantee the payment of the obligation of the Multnomah Hotel Company, a separate entity, and had no authority, under its charter, to execute the contract in question guaranteeing the repayment to the Thompson Estate Company of bills against the Multnomah Hotel Company, agreed to be handled by said estate company.

“I am of the opinion, however, after careful consideration of the law and the facts in this case presented, and after an examination of the charter of I. Gevurtz & Sons, and the amendments thereto; and after an examination of the contract entered into by the bankrupt, that the objections of the ‘Trustees’ are not well taken and that the claim of the R. R. Thompson Estate is a provable one against the bankrupt estate, and it is so ordered.

(Sgd) C. G. MURPHY,
Referee in Bankruptcy.”

Mr. Teiser: Now I will introduce in evidence, your Honor, dividend sheets in the I. Gevurtz & Sons proceedings, showing the direction of payment to the R. R. Thompson Estate Company of some thirteen or fourteen thousand dollars dividends on this claim of \$57.-

567.04, which is the \$60,000 less the stipulated reduction of two thousand some hundred dollars.

COURT: What proportion of this \$60,000 was paid out of the estate?

Mr. Teiser: Of I. Gevurtz & Sons?

COURT: Yes.

Mr. Teiser: 23 per cent, so far. The estate is not closed.

Mr. McCurtain: I make the same objection as last stated.

Objection overruled. Exception allowed.

Which said dividend sheet marked Exhibit "I," omitting parts not pertaining to, or in any way connected with this controversy, is in words and figures as follows, to-wit:

		Allowed after hearing	
#380 — R.R. Thompson Estate Co.	for	Dividend	
Filed for \$60,489.42	\$57,556.04	\$2877.80	

And which said dividend sheet marked Exhibit "J," omitting parts not pertaining to, or in any way connected with this controversy, is in words and figures as follows, to-wit:

		Allowed after hearing	
#380 — R.R. Thompson Estate Co.	for	Dividend	
Filed for \$60,489.42	\$57,556.04	\$10,360.08	

Mr. McCurtain: I will say we will admit that dividends have been paid to the extent of 23 per cent, if it will shorten the record any.

COURT: Is the Gevurtz estate settled?

Mr. Teiser: No, sir.

COURT: Will there be other payments?

Mr. Teiser: There will be, I suppose. I don't know, your Honor, whether there will or not. There will probably be a small dividend. I don't suppose there will be a 2 per cent dividend, will there?

Mr. McCurtain: I don't know. We are not handling that. It probably won't be over one or two per cent.

Mr. Teiser: I don't know about that, your Honor. I would also like to introduce in evidence schedules in bankruptcy of the Multnomah Hotel Company. It is possible at this time this may not be admissible. I am introducing it for what it is worth.

Which said Exhibit "K," being the original Schedule in Bankruptcy filed by the Multnomah Hotel Company, and which was verified by Roy O. Yates, president of Multnomah Hotel Company, omitting those parts which relate to the scheduling of claims other than the plaintiffs' herein, is in words and figures as follows, to-wit:

"SCHEDULE A-3

Name of Creditor	Residence	When and Where Contracted	Nature and Consideration	Amount
Weinhard Brewery Co.	Portland, Or.	Portland, Or.	Goods, Wares and Merchandise.	\$3,500 (Individual Liability)"

Mr. Teiser: Your Honor, we had a stipulation with counsel—I have here the Multnomah Hotel Company's books—that it would not be necessary to put the trustee in bankruptcy on the stand to identify these books, as the books of the Multnomah Hotel Company. That is correct, is it not?

Mr. Bauer: We will consent to that.

Mr. Teiser: And that the books were kept under the regime of Mr. Yates.

Mr. Bauer: I don't say that. Mr. Yates took possession for the Thompson Estate Company.

Mr. McCurtain: What do you want to show by these books?

Mr. Teiser: I want to show that on page 22 of the journal there is scheduled or listed "I. Gevurtz & Sons, bills payable, \$6550.00." And credited bills payable \$6550.00. And under that "We assume payment of the following notes: Henry Weinhard Estate \$1500, Henry Weinhard Estate \$4500, National Cash Register \$550."

Mr. McCurtain: You want to prove that the Multnomah Hotel Company's books show that entry?

Mr. Teiser: Yes.

Mr. McCurtain: We admit it.

Mr. Teiser: You admit they were kept by Mr. Yates?

Mr. McCurtain: Kept under his direction while he was managing the hotel. They were kept under his direction.

COURT: I understand you admit the whole entry?

Mr. McCurtain: Yes. The entry shows that the Multnomah Hotel Company assumed these notes and agreed to pay them.

Mr. Teiser: You admit the entry?

Mr. McCurtain: Yes, whatever you can get out of it.

Mr. Teiser: Not your deductions.

Mr. McCurtain: Whatever inference can be drawn from it, yes.

Mr. Teiser: Now, your Honor, for fear that I have failed to ask that all these claims and other matters which I have introduced in evidence be introduced in evidence, I now offer them in evidence; and I assume that you will admit that they are filed on the dates, so far as the claims are concerned, which are set forth by the stamp of the referee?

Mr. McCurtain: I want your Honor clearly to understand, with relation to these records, we do not want to raise any objection to the form of the offer or any question about the authenticity of the papers or the dates they were filed, or anything that is shown by those records. The only purpose I have in making objection is to save what we consider our rights under the complaint. We claim that the entire record so far introduced is incompetent, irrelevant and immaterial, and does not in any way tend to bind the Thompson Estate Company to the payment of this note.

COURT: I understand your objection. You may have your exception.

Mr. Teiser: Now, your Honor, it is always a little embarrassing to speak about attorney's fees, but there is

a claim under that note for attorney's fees. It is a claim of \$500 for attorney's fees for suit on the note, and if your Honor will decide that question, I am perfectly willing to leave it to your Honor in case the decision is in our favor.

Mr. McCurtain: We are perfectly agreeable to that suggestion, if you find for the plaintiffs, that you fix such attorney fee as you deem is reasonable under all the circumstances.

COURT: Very well.

Mr. Teiser: We rest, your Honor.

Mr. McCurtain: We rest, your Honor.

ARGUMENT.

Mr. McCurtain: We would like the admission in the record that you are not seeking to claim here on estoppel.

Mr. Teiser: I am not seeking to recover on estoppel in this case. I am saying you are estopped from claiming certain things you are claiming in this case.

Mr. McCurtain: I would like the record to show that.

After the hearing of said cause the court took the same under advisement, and on or about the 21st day of May, 1917, made and entered judgment for the plaintiffs, as will appear from the judgment order filed; and thereafter on or about the 8th day of June, 1917, the defendant duly filed its motion for a new trial and for an order vacating and setting aside the general findings and judgment theretofore made and entered, and for a rehearing and tendered to the court special findings of

fact and conclusions of law which it requested the court to make, and that on the hearing of said motion the following proceedings were had, to-wit:

“WOLVERTON, District Judge. (Orally)

“There are two cases bearing upon this subject, which I have examined, and one is the case cited by counsel this morning—*Humphreys v. Third National Bank of Cincinnati, Ohio*, found in 75 Federal at page 852. That is a case in the Circuit Court of Appeals for the Sixth Circuit. In that case Judge Taft intimates that the practice has resulted as a sort of trap to catch the unwary, although upon consultation of the decisions of the Supreme Court of the United States every lawyer ought to be advised of the practice.

“Of course, it is my purpose to avoid entrapping counsel or the parties into a situation that would prevent them from presenting their case in full in the Court of Appeals.

“Now, there are two ways of raising the questions which it is proposed to raise in this case. The question that is desired to be raised primarily is whether or not the testimony in the case supports the verdict. That is the effect of it. One way of raising that question is, as pointed out by Judge Taft in his opinion, by request to the court to direct a verdict on the ground of insufficiency of the evidence. That is a motion that is often made when a jury is called and the trial is before a jury, and it is a motion that could have been made in this case; and I do not think that the court at this time would be warranted in setting aside this verdict for the purpose of

allowing that motion to be made. The other manner in which the question might be raised is by presenting to the court findings, and then the court may pass upon those findings. If the court refuses to make the findings, then that may be reserved by exception, and that would raise the entire question.

"I rather think in this case, in order that the matter may be fully presented, that the verdict should be set aside, and the court will refuse these findings which have been tendered, and then the court will make the same general findings as it made before, and the judgment may be entered as of this date. The clerk will make a copy of those findings, so that I can sign them, the general findings, and that will make up the record of the court.

"Mr. Greene: If your Honor please, the exceptions will be separate as to each proposed finding that we submitted, I suppose?

"COURT: Yes, and to each proposed finding of law, and the general exception to the refusal to find as you have requested.

"Mr. Greene: May we also at this time, your Honor, request the court to make special findings in accordance with the general verdict, the finding that you made, and except to the court's refusal to make special findings covering your verdict or general finding and judgment or conclusion therefrom?

COURT: Well, you will have to formulate those special findings before they will amount to anything.

"Mr. Greene: That is what I was a little doubtful about, because those findings would be adverse to our

contention; and it seems to me that, if the court saw fit to make special findings in support of your general finding and conclusion or judgment, the counsel for the side in whose favor your general verdict is, if the court orders them or wants to make those special findings, ought to prepare special findings to support the verdict.

“COURT: My view of the law on that question is this: That under the statute the court has a discretion to make either special findings or a general finding. In this case the court has exercised its discretion in making a general finding. It is like the trial of a case before a jury—sometimes counsel ask that the jury make special findings. The court then and there exercises its discretion as to whether it will submit to the jury special findings. Generally this court has refused to submit to the jury special findings.”

“Mr. Greene: I know as a rule they do make more trouble than the convenience accruing from them.

“COURT: Many times they do.

“Mr. Greene: In this suggestion of mine I was following the suggestion I think Judge Taft made in that case your Honor cited: that if counsel desire to review errors of law, they must ask the court for special findings, and, as I recollect that decision, Judge Taft indicates that the special findings you tender the court must be the special findings warranted by his general finding, therefore adverse to you, and then take exception to his refusal to make those special findings; or if he does make them, then you have the special findings against you.

"COURT: I will decline to exercise—in the exercise of my discretion, I will decline to make any special findings which support the general verdict in this case.

"Mr. Greene: And allow us an exception to that, your Honor.

"COURT: Yes, you may have your exception to that. The other case I referred to, that I meant to have called to your attention, is the case of *Kentucky Life & Acc. Ins. Co. v. Hamilton*, 63 Fed. 93. That was also a case of the Circuit Court of Appeals, Sixth Circuit, and is a review of the Supreme Court decisions upon the subject.

"Mr. McCurtain: That is Judge Lurton's decision, is it not, your Honor?

"COURT: Yes, that is Judge Lurton's decision. This is as far as I think I ought to go in this case.

"Mr. Greene: I think that is sufficient, your Honor. We will draw the order and submit it to counsel, in accordance with your Honor's ruling today.

"COURT: Very well. There is a case that has gone up, that is now pending in the Circuit Court of Appeals, *Pacific Machinery Company v. Meyer*. It involves machinery in a saw mill plant.—Senator Gearin was on one side and Seattle attorneys on the other. In that case I made a general finding, and after that I permitted the losing party to submit special findings, and those I declined to approve or sign. At the same time the other party submitted special findings also, and I refused to sign those.

"Mr. Greene: Well, they may go up on pretty much the same sort of record that we have here.

"COURT: That you would have had here if I had not set aside this verdict.

"Mr. Greene: Yes. I see."

Thereafter the court entered its order on or about the 8th day of June, 1917, allowing defendant's motion for an order setting aside the general verdict or findings and judgment theretofore entered on the 21st day of May, 1917, and considered the special findings of fact and conclusions of law proposed and requested by the defendant, which proposed findings of fact and conclusions of law were filed with the clerk of this court, and the court by said order refused to make, sign or file the said findings of fact or conclusions of law proposed by the said defendant, or either of them, to which refusal of the court as to each of said proposed findings of fact and conclusions of law separately the defendant duly excepted, and the court allowed the defendant's exception to its refusal to make sign or file said findings of fact or conclusions of law, and to each of them separately.

Whereupon the defendant requested the court to make, sign and file special findings of fact and conclusions of law herein in accordance with the general findings and verdict theretofore entered and vacated by the court, and the court in its discretion refused to make any special findings of fact or conclusions of law in said cause, to which refusal of the court to so make and sign special findings of fact and conclusions of law, the defendant duly excepted and the court allowed its exception.

THE FOREGOING BILL OF EXCEPTIONS was presented to the court the 2nd day of Au-

gust, 1917, within the time allowed by order of the court to present the same and counsel for plaintiffs and defendant, respectively, in open court having stipulated and agreed that the foregoing proceedings shall stand as the statement of facts on appeal, and that it contains all of the evidence and proceedings had in this court in the trial of said cause, and that those portions omitted from the exhibits set forth herein are entirely foreign to this controversy and have no materiality in connection therewith.

IT IS ORDERED that the foregoing Bill of Exceptions and transcript of the evidence and proceedings, be and it is hereby allowed this 2nd day of August, 1917, and that the same shall stand as the statement of the facts in this cause on appeal.

Dated at Portland, Oregon, this 2nd day of August, 1917.

(Signed) CHAS. E. WOLVERTON,

District Judge.

(Endorsed) Filed Aug. 2, 1917.

G. H. MARSH, Clerk.

That thereafter, on the 15th day of August, 1917, there was duly filed in said court and cause a Stipulation as to Transcript of Record which (omitting title and formal parts) is in words and figures as follows, to-wit:

STIPULATION AS TO TRANSCRIPT OF RECORD.

(Endorsed) • Filed Aug. 15, 1917.

G. H. MARSH, Clerk.

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON.

Louise Weinhard and Anna Wessinger, Paul
Wessinger and Henry Wagner, Execu-
trices and Executors, respectively, of the
last Will and Testament of Henry Wein-
hard, deceased,

Plaintiffs,

vs.

The R. R. Thompson Estate Company, a
corporation,

Defendant.

IT IS HEREBY STIPULATED by and between
the attorneys for the plaintiffs and the attorneys for the
defendant, respectively, that the Transcript of Record
on Writ of Error in the above styled cause shall consist
of the following documents:

Complaint, Amended Answer, Reply, Stipulation
Waiving Trial by Jury, Opinion on the Merits, Find-
ings of Fact (filed May 21, 1917), Judgment Order (of
May 21, 1917), Motion to Vacate and Set Aside General
Findings and Judgment and for a New Trial, Findings
and Conclusions Proposed by Defendant, Opinion and
Order (of June 11, 1917), Findings of June 11, 1917,
Petition for Writ of Error, Assignments of Error, Or-
der Allowing Writ of Error, Writ of Error, Bond, Or-
der of Supersedeas, Citation on Writ of Error, with
acceptance of service, Order for time to file Transcript
of Evidence, Bill of Exceptions, and this Stipulation.

Dated at Portland, Oregon, this 14th day of August,
1917.

SIDNEY TEISER,

Of Attorneys for Plaintiffs.

A. H. McCURTAIN,

Of Attorneys for Defendant.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,

District of Oregon—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, hereby certify that the foregoing pages numbered 1 to ———, inclusive, contain and are a true transcript of the record and proceedings had in said court and cause entitled The R. R. Thompson Estate Company, a corporation, vs. Louise Weinhard and Anna Wessinger, Paul Wessinger and Henry Wagner, Executrices and Executors, respectively, of the Last Will and Testament of Henry Weinhard, Deceased, and contains in itself and not by reference, all the pleadings, orders, papers, files and journal entries therein made or considered by the court in the rendition of the final judgment; the Petition for Writ of Error, order thereon, Assignments of Error, bond, together with all the evidence and exhibits and introduced on the trial as the same appear in my office and official custody.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court this ——— day of August, 1917.

.....
Clerk.

IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT

THE R. R. THOMPSON ESTATE COMPANY,
a Corporation,

Plaintiff in Error,

vs.

LOUISE WEINHARD and ANNA WESSINGER,
PAUL WESSINGER and HENRY
WAGNER, Executrices and Executors, respectively,
of the Last Will and Testament of Henry Weinhard, Deceased,

Defendants in Error.

In Error to the District Court of the United States for
the District of Oregon.

Brief on Behalf of Plaintiff
in Error

Filed

SEP 12 1917

F. D. Monckton,
Clerk.

No.

IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT

THE R. R. THOMPSON ESTATE COMPANY,
a Corporation,

Plaintiff in Error,

vs.

LOUISE WEINHARD and ANNA WESSINGER,
PAUL WESSINGER and HENRY
WAGNER, Executrices and Executors, respectively,
of the Last Will and Testament of Henry Weinhard,
Deceased,

Defendants in Error.

In Error to the District Court of the United States for
the District of Oregon.

Brief on Behalf of Plaintiff
in Error

IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT

THE R. R. THOMPSON ESTATE COMPANY,
a Corporation,

Plaintiff in Error,

vs.

LOUISE WEINHARD and ANNA WESSINGER,
PAUL WESSINGER and HENRY
WAGNER, Executrices and Executors, respectively,
of the Last Will and Testament of Henry Weinhard, Deceased,

Defendants in Error.

Names and Addresses of Attorneys upon this Writ of
Error.

For Plaintiff in Error:

BAUER & GREENE and A. H. McCURTAIN,
Henry Building, Portland, Oregon.

For Defendants in Error:

SIDNEY TEISER,
Morgan Building, Portland, Oregon.

JULIUS SILVERSTONE,
Lumbermans Building, Portland, Oregon.

IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT

THE R. R. THOMPSON ESTATE COMPANY,
a Corporation,

Plaintiff in Error,

vs.

LOUISE WEINHARD and ANNA WESSINGER, PAUL WESSINGER and HENRY WAGNER, Executrices and Executors, respectively, of the Last Will and Testament of Henry Weinhard, Deceased,

Defendants in Error.

**Brief on Behalf of Plaintiff
in Error**

STATEMENT:

The plaintiff in error, the R. R. Thompson Estate Co., is a corporation domiciled in California, and the defendants in error are the executrices and executors of the last will and testament of Henry Weinhard, deceased, residing in Oregon. For convenience in this

statement the parties will be referred to as the Thompson Estate and the Weinhard Estate.

In 1912 and 1913 the Thompson Estate was the owner of a block of ground in Portland, Oregon, lying between Third and Fourth, and Oak and Pine Streets, improved with a nine-story hotel building, and the Weinhard Estate was engaged in conducting a brewery in the same city.

I. Gevurtz & Sons, an Oregon corporation, was engaged in the selling of furniture at both wholesale and retail, and as an incident to its business dealt largely, as owner and lessee, in hotel properties; its general scheme being to buy or lease a hotel building, furnish the same from its stock of merchandise, and sell the same as soon thereafter as a purchaser, willing to pay such sum as would net a profit on the transaction, could be found. In pursuance of this plan I. Gevurtz & Sons leased from the Thompson Estate the hotel building on its property, commonly known as "The Multnomah," and immediately thereafter organized the Multnomah Hotel Co., an Oregon corporation, and subscribed for the major portion of its capital stock, and in payment therefor sold and transferred the lease, and the furniture and fixtures theretofore installed in The Multnomah, to the new company, which company proceeded to engage in the general hotel business. Both I. Gevurtz & Sons and the Multnomah Hotel Co. became involved in financial difficulties in 1912, and I. Gevurtz & Sons found it impossible to sell The Multnomah in accordance with its previous methods of doing business.

On January 10, 1913, I. Gevurtz & Sons, for the expressed consideration of One Dollar, gave an option in writing to the Thompson Estate, by the terms of which it agreed to sell to the Thompson Estate, providing said option was exercised, all the common and preferred capital stock of the Multnomah Hotel Co., for the sum of \$175,000.00, the same to be paid in cash upon delivery of the stock. The option further provided that the Thompson Estate should have the right in paying said consideration, to apply the same toward the payment of the indebtedness of said Multnomah Hotel to the First National Bank of Portland, Oregon, and to all of the other creditors of said company, to the extent of said sum of \$175,000.00, and that all other liabilities or indebtedness of said Multnomah Hotel Co. up to the date of the transfer of said capital stock *should be paid, satisfied and discharged by I. Gevurtz & Sons*; and further, that in the event I. Gevurtz & Sons were not in position to pay such additional debts as they became due, The Thompson Estate would loan to I. Gevurtz & Sons the necessary money wherewith to pay such debts in excess of \$175,000.00, provided that I. Gevurtz & Sons would execute its note to the Thompson Estate, payable six months from January 1, 1913, carrying 6 per cent interest, and provided further, that such sum so to be loaned should not exceed \$35,000.00.

The option further expressly provided that I. Gevurtz & Sons should warrant and guarantee the said Thompson Estate against any and all indebtedness and liabilities of said Multnomah Hotel Co. over and above the aggregate amounts of \$175,000.00, the considera-

tion for the sale of the capital stock, and the \$35,000 to be loaned as aforesaid; and should indemnify the Thompson Estate against all claims, demands, actions, damages, liabilities, suits, fines, liens, contracts, etc., of any character whatsoever, either due I. Gevurtz & Sons or any other person, firm or corporation. And the parties expressly further stated in said option as follows (page 97 Transcript): "It being the intention that in selling all of the common and preferred stock of the corporation to said The R. R. Thompson Estate Co. for the sum of \$175,000.00, as aforesaid, the said Thompson Estate Co. shall thereby obtain good title to all of the property and assets of said Multnomah Hotel Co., free and clear of all claims, demands, liabilities, liens or indebtedness of any character or nature whatsoever, and that any and all other such debts, liabilities, liens or indebtedness shall be assumed and be paid by said I. Gevurtz & Sons, and the advance by the R. R. Thompson Estate Co. of the additional sum of \$35,000 shall only be as a matter of accommodation to I. Gevurtz & Sons, and *shall not be any acknowledgment of any assumption by the said Thompson Estate Co. of any further liabilities or for the payment of any greater sum for the assets of the Multnomah Hotel Co. than represented by the purchase price of the common and preferred stock.*" (Italics ours.)

At the time this option was given a hurried examination of the books of the Multnomah Hotel Co. lead to the conclusion that \$35,000.00, together with \$175,000.00, the purchase price of the stock, would pay all of the creditors of the Multnomah Hotel Co.

The Thompson Estate exercised its option to purchase, and the capital stock of the Multnomah Hotel Co. was delivered to it by I. Gevurtz & Sons, and the Thompson Estate Co. actually paid the creditors of the Multnomah Hotel Co., including the First National Bank, which claim alone amounted to \$143,000.00, the full purchase price of \$175,000.00, and also disbursed, by arrangement with I. Gevurtz & Sons, to the creditors of the Multnomah Hotel Co., \$35,000.00, and took the note of I. Gevurtz & Sons in payment thereof, as had been previously agreed upon.

At the time of these payments and the delivery of the capital stock, I. Gevurtz & Sons also made, executed and delivered to the Thompson Estate Co. its guaranty in writing to the effect that it would guarantee and indemnify the Thompson Estate against any and all further claims, liabilities, etc., of the said Multnomah Hotel Co.

After the Thompson Estate had completed a thorough examination of the Multnomah Hotel Co. books it was discovered that in addition to the creditors paid to the extent of \$210,000.00 advanced by the Thompson Estate Co. there remained unpaid creditors having claims against the Multnomah Hotel Co., aggregating in round numbers \$24,000.00, and relying upon the written guaranty of I. Gevurtz & Sons, and believing itself protected thereby, the Thompson Estate paid from time to time the claims of creditors as they were presented until I. Gevurtz & Sons were adjudged bankrupt by the United States District Court for Oregon, and the Thompson Estate Co. discovered that the guaranty it

had relied upon in making the payments as aforesaid, was no more than "a mere scrap of paper."

At this time there remained unpaid the claim of Weinhard Estate, consisting of two notes for \$4,500.00 and \$1,500.00 respectively, besides another claim due the National Cash Register.

On May 29, 1913, the Thompson Estate filed its claim against the bankrupt estate of I. Gevurtz & Sons, setting forth therein by way of attached exhibits, the option, the note, the guaranty, copies of minutes of directors' meetings of I. Gevurtz & Sons, and full statements of accounts paid under the arrangement by it, and also those claims remaining unpaid, which latter claims included the Weinhard Estate's claim, thereby exhibiting to the referee in bankruptcy the entire history of the transaction between I. Gevurtz & Sons and itself, and the basis of its claim. Subsequently the claim was amended and was finally allowed by the referee, and dividends thereon to the extent of 23 per cent have been paid to the Thompson Estate.

On April 15, 1916, three years later, the Weinhard Estate made demand on the Thompson Estate for payment of \$3,500.00 and interest, the balance alleged to be due it on account of a note for \$4,500.00, dated at Portland, Oregon, March 6, 1912, and signed by the Multnomah Hotel Co., Philip Gevurtz and I. Gevurtz & Sons, which demand was refused by the Thompson Estate, and this litigation is the result of such refusal.

The complaint contains a statement of two alleged causes of action, by the first of which it is charged, after

setting forth the status of the parties, the giving of the \$4,500.00 note, signed by Multnomah Hotel Co., Philip Gevurtz and I. Gevurtz & Sons, the option given Thompson Estate by I. Gevurtz & Sons, etc. (paragraph VIII, page 11 of the Transcript), that the Thompson Estate Co. exercised its option to assume and agreed to pay and assumed all the debts of the Multnomah Hotel Co. owing at the time of said purchase of said capital stock, in excess of \$175,000.00, and that the R. R. Thompson Estate Co. assumed the debts of said Multnomah Hotel Co. owing the plaintiffs herein, and (paragraph IX, page 12 of the transcript) that the R. R. Thompson Estate Co. in the proceedings in bankruptcy of I. Gevurtz & Sons, admitted its assumption of all the debts of said Multnomah Hotel Co. and filed its claim against said estate for the amount of debts of said Multnomah Hotel Co. assumed or paid by it in excess of \$175,000.00, and concludes, in paragraph XI, that by reason of the premises the Thompson Estate became indebted to the Weinhard Estate for the balance due on the note here sued on. By the second cause of action the same facts are pleaded with this difference: that it is claimed that the debts of the Multnomah Hotel Co., including the Weinhard Estate claim, did not amount to \$175,000.00, by reason of which premises the Thompson Estate Co. should pay the claim. The answer, in so far as is relied upon by the Thompson Estate, consisted of a general denial, and put the plaintiff to its proof.

At the trial which was had by the court, both parties having waived a jury in writing, there was introduced

in evidence, over plaintiff in error's objection, in the order herein stated:

EXHIBIT "A"—

Note from the Multnomah Hotel Co., Philip Gevurtz and I Gevurtz & Sons to the defendant in error (Transcript, p. 68).

EXHIBITS "B" and "C"—

Two checks showing payment by the Weinhard Estate to the Multnomah Hotel Co. of \$2,000.00 and \$2,500.00 respectively (Transcript, p. 71).

EXHIBIT "D"—

Claim of the Thompson Estate Co. in the bankruptcy matter of I. Gevurtz & Sons (Transcript, p. 77).

EXHIBIT "E" —

Amended claim of the Thompson Estate Co., in the bankruptcy matter of I. Gevurtz & Sons (Transcript, p. 81).

Attached to Exhibit "D" and by reference made a part of Exhibit "E" are certain documents: (a) Statement of account between I. Gevurtz & Sons and the Thompson Estate Co., 89 Transcript; (b) Statement of accounts paid by the Thompson Estate Co., 92-3 and 4, Transcript; (c) Statement of accounts unpaid by the Thompson Estate Co., 95 of Transcript; (d) The option, page 95 Transcript; (e) the note for \$35,000.00 from I. Gevurtz & Sons to the Thompson Estate, page 99, Transcript; (f) the guaranty from I. Gevurtz & Sons to Thompson Estate Co., page 100 Transcript; (g) Copy of the minutes of the board of directors of

I. Gevurtz & Sons, authorizing the sale of the capital stock, and the execution of the note and guaranty by I. Gevurtz & Sons:

EXHIBIT "F"—

Stipulation between the attorneys for trustee in bankruptcy, and the Thompson Estate Co. (Transcript, p. 114).

EXHIBIT "G"—

Memorandum of authorities submitted by the Thompson Estate Co. attorneys, to the referee in bankruptcy, in the matter of I. Gevurtz & Sons, bankrupts (Transcript, p. 116).

EXHIBIT "H"—

The order of the referee in bankruptcy allowing the claim (Transcript, p. 127).

EXHIBITS "I" and "J"—

Dividend sheets of I. Gevurtz & Sons in bankruptcy (Transcript, p. 130).

EXHIBIT "K"—

Schedules in bankruptcy of Multnomah Hotel Co., (Transcript, p. 132).

The foregoing together with the admission by counsel that the books of the Multnomah Hotel Co. contained a certain statement concerning the claims sued on, (page 133 of the Transcript) makes up the entire evidence submitted to the District Court.

After the trial the court filed its opinion and a general finding for the defendants in error (38 of Transcript), upon which judgment was entered for the de-

fendant in error May 21, 1917, page 38 of Transcript. On June 8, 1917, plaintiff in error filed its motion to vacate the judgment and to set aside the findings, and for a new trial (39 of Transcript), and on June 11, 1917, the District Court entered an order granting said motion for the purpose of allowing plaintiffs in error to present to the court proposed special findings of fact and conclusions of law, and the court considered the said findings and conclusions proposed by the plaintiff in error, and on June 11, 1917, declined and refused to make, sign or file either of the same; whereupon the plaintiff in error requested the court to make, sign and file special findings of fact and conclusions of law in accordance with the court's general finding theretofore vacated, which the court in its discretion refused to do, to all of which actions on the part of the court the plaintiff in error duly excepted, and its exceptions were allowed (see pages 49, 50 and 51 of Transcript). Whereupon the court having again filed its general finding and judgment, plaintiff in error prosecutes this writ of error.

By stipulation between the parties the bill of exceptions contains all of the evidence and proceedings had in the trial court, and it is stipulated that the same shall stand as a statement of facts in this court.

SPECIFICATIONS OF ERROR.

In the proceedings before the honorable District Court there was error in this:

First. In the holding by the court that the complaint stated facts sufficient to constitute a cause of action.

Second. In the holding by the court that the evidence introduced and received was admissible under Section 808, Lord's Oregon Laws (Subdivision 2).

Third. In the holding by the court that the evidence introduced and received proved or tended to prove the material allegations of the complaint.

Fourth. In the refusal of the court to make, sign and file the special findings of fact proposed by the plaintiff in error.

Fifth. In the refusal of the court to make, sign and file the conclusions of law proposed by the plaintiff in error.

Sixth. In the refusal of the court to make, sign and file special findings of fact and conclusions of law to support its judgment, and

Seventh. In the holding by the trial court that there was sufficient evidence to support the complaint, or a judgment for the defendant in error.

ARGUMENT.

In argument we will present the case by considering:

First: The first specification of error;

Secondly: The second specification of error; and

Lastly: The third, fourth, fifth, sixth and seventh specifications of error.

The complaint does not state a cause of action.

It appears from the complaint that the agreed consideration to be paid by plaintiff in error to I. Gevurtz & Sons was \$175,000.00. It further appears from the complaint that the plaintiff in error actually paid, or assumed debts in excess of said sum. Such agreement was void as to the excess of \$175,000.00, for two reasons, namely, for want of consideration, and because the undertaking to assume debts in excess of \$175,000.00 was void, because no memorandum of the same was signed by the plaintiff in error, the party to be charged.

Secondly. In support of the second specification of error we respectfully insist that none of the evidence introduced was competent.

Our State, in common with others, has adopted the statute providing that agreements to answer for the debt, default, or miscarriage of another, shall be void unless some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged, or his lawfully authorized agent, and that "evidence therefore of the agreement shall not be received, other than the writing or secondary evidence of its contents in the cases prescribed by law."

Lord's Oregon Laws, Sec. 808, Subdivision 2.

All the cases hold that there is an exception to the rule that the agreement must be in writing, where, because of the relation between the parties it can be said that the promise to pay a third party's debt is in effect

a promise to pay the promisor's own debt. The author of the article on the Statute of Frauds in Cyc., states the rule as follows: "It is of importance to determine in each case of an undertaking which in form purports to be the promise to pay the debt of another, whether it is such in fact, for it is well settled that if an oral agreement is in effect a promise to pay the debt of the promisor himself, it is not within the statute of frauds, although the incidental result of its performance may be the discharge of the indebtedness of another person * * *. Or where the promisor, being the vendee of property, orally agrees to pay a debt of the vendor, in payment of the price of the property bought." Citing *Champlain Construction Co. vs. O'Bryan*, 117 Fed. 271. "But the principle will not be construed to extend to an oral promise to pay an amount in excess of that for which the promisor is legally liable." 20 Cyc., 167, citing *Hill vs. Daugherty*, 33 N. C. 195.

All the evidence offered by the defendant in error in this case established or tended to establish conclusively that the plaintiff in error had actually disbursed in cash an amount in excess of \$210,000.00, whereas the agreement to purchase fixed the consideration for the capital stock sold at \$175,000.00.

In the case of *Kiernan vs. Kratz*, 42 Ore. 477, the Supreme Court of Oregon, on this question said, page 478: "A well recognized exception to this rule exists, however, where a debtor assigns funds or securities, or transfers property to another, who in consideration of the receipt thereof, orally promises to pay the debtor's obligations to a third person, in which case the

latter may maintain an action on such agreement though not a party thereto. The reason for this deviation from the expressed provision of the statute is based upon the assumption that the oral promise attaches to the obligation growing out of the receipt of the fund, security, or property, rendering the agreement enforceable for the benefit of the person for whose benefit it is made." Page 480, quoting Justice Grover of the Supreme Court of New York: "The language shows that the test to be applied to every case is whether the party sought to be charged is the principal debtor, primarily liable, or whether he is only liable in case of the default of the third person,' and it was held that to take the case out of the statute there must be a consideration moving to the promisor either from the creditor or the debtor, and beneficial to him, thus imparting to the promise the character of an original undertaking."

Page 482, quoting *Fullam vs. Adams*, 37 Vt. 391: "If the real substance of the promise be to perform some duty or obligation of the party making the promise, it is not within the statute, though in form it is a promise to pay another's debt, and the result of its performance may affect the payment of the debt of another. And we believe it will be found that in all the cases now regarded as sound, where it has been held that a parol promise to pay the debts of another is binding, the promisor held in his hands funds, securities, or property of the debtor devoted to the payment of the debt, and his promise to pay attaches upon his obligation or duty growing out of the receipt of such fund.' "

So it will be seen from an examination of the au-

thorities and the opinions of text-writers who have discussed this proposition, that in no case has it been said that evidence may be introduced of the oral promise to pay another's debt, unless it be first shown that the promisor has in his hands some fund, property or thing for which he is obliged to account, and which thus places him in the legal position of paying his own debt rather than the debt of another. In the case at bar it was a prerequisite to the introduction of any testimony showing or tending to show an assumption or promise on the part of the plaintiff in error to pay the defendant in error's claim, to show: either that there was a fund in the hands of the plaintiff in error out of which the defendant in error's claim might be satisfied, or some other reason to take the case out of the general rule. And in the absence of such showing the evidence that was admitted and received over the plaintiff in error's objection was inadmissible.

We come now to the propositions covered by the third, fourth, fifth, sixth and seventh assignments of error, and contend that none of the evidence introduced and received proved or tended to prove the material allegations of the complaint, but on the contrary, the evidence, which consisted principally of writings, established the findings of fact proposed by the plaintiff in error, upon which the the plaintiff in error was entitled to have the court make the conclusions of law proposed by it. The court not only refused to make the special findings and conclusions proposed by the plaintiff in error, but refused to make any special findings of fact or conclusions of law, and from a consideration

of the entire evidence it will appear that there was nothing offered upon which can be predicated a judgment for the defendant in error. The entire issues before the trial court and to be decided in this court may be summed up in the following query:

WILL W, BEING THE CREDITOR OF G AND M, CORPORATIONS, BE PERMITTED TO MAINTAIN AN ACTION IN HIS OWN NAME AGAINST T, THE PURCHASER OF G'S STOCK IN M, UPON THE THEORY THAT T PROMISED G TO PAY M'S DEBT, WHEN IT IS SHOWN THAT T HAS ALREADY PAID THE FULL PURCHASE PRICE TO M'S CREDITORS?

We answer this query, No, for two reasons: First, the full purchase price having been paid, there was no consideration for the promise, if given, for from the earliest cases the only reason given for permitting the creditor of one person to sue in his own name upon a promise made for his benefit to his debtor by the purchaser of that debtor's assets, was, that his debtor having given a good and valuable consideration for such a promise, the purchaser was charged with a duty in the nature of a trust, to distribute the funds in his hands in accordance with his promise to the seller, and that the creditor having an interest in that fund, was entitled to sue in his own name, without showing any new consideration for that promise. But we have found no case wherein it has been held that the creditor could compel the payment of anything more than the purchase price.

National Bank vs. Grand Lodge, 98 U. S. 123
(25 Law Ed. 74).

Anderson vs. Fitzgerald, 21 Fed. 295.

Sayword vs. Dexter Horton & Co., 72 Fed. 765.

American Exchange Bank vs. N. P. Railway
Co., 76 Fed. 130.

Pennsylvania Steel Co. vs. N. Y. City Railway
Co., 198 Fed. 749.

Dewing vs. Leavitt, 85 N. Y. 30.

First Nat. Bank of Sing Sing vs. Chalmers, 39
Hun. 475.

Jefferson vs. Asch, 53 Minn. 447.

McArthur vs. Dryden, 6 N. D. 438.

Hargadine vs. Swoffert, 65 Kans. 575.

Ellis vs. Harrison, 104 Mo. 270.

Rathel vs. Smith, 68 Mo. 258.

Bank vs. Chick, 170 Mo. App. 347.

Adams vs. Quehn, 119 Pa. St. 85.

Davis vs. Dunn, 121 Mo. App. 493.

9 Cyc., 374, 376, 377, 380, 382, 386.

Linneman vs. Moross, 39 Am. St. Rep. 531 and
note therein.

Parker vs. Jeffery, 26 Ore. 189-190.

Washburn vs. The Investment Co., 26 Ore. 441.

Brower Lumber Co. vs. Miller, 28 Ore. 569, 570
and 571.

Feldman vs. McGuire, 34 Ore. 312, 13.

Such a promise as was given in this case, if we assume the most favorable construction that can be placed upon the situation for the defendant in error, was void under the statute of frauds, as it was not the promise to answer for the debt of the plaintiff in error but for the debt of the Multnomah Hotel Co.

Lord's Oregon Laws, Sec. 808 *supra*.

Feldman vs. McGuire, *supra*.

It is charged by the complaint that the plaintiff in error assumed and agreed to pay the defendant in error's demand. In order to establish this proposition the defendant in error introduced in evidence: First, the promissory note payable to itself, signed by Multnomah Hotel Co., Philip Gevurtz and I. Gevurtz & Sons, together with two checks evidencing the payment by the defendant in error to Multnomah Hotel Co., of the sum represented by that note; next was introduced in evidence, proof of claim, of the plaintiff in error against the bankrupt estate of I. Gevurtz & Sons, wherein it is stated (page 83 of the Transcript) that the lists attached to said proof of claim, marked A, B, C, D, E and F, was a detailed statement of all claims, liabilities and demands due and owing from the Multnomah Hotel Co. *and assumed and agreed to be paid by said bankrupt*; and Exhibit D there referred to (which is set forth on pages 92-3-4 and 5 of the Transcript) shows the account of Henry Weinhard Estate to consist of two notes for \$1500.00 and \$4500.00, respectively; so that the proof of claim in bankruptcy, if it established anything,

established not the assumption of defendant in error's claim by the plaintiff in error, but established the fact that the plaintiff in error did not assume or agree to pay it. Attached to said proof of claim and marked Exhibit G, was the option given by I. Gevurtz & Sons to the plaintiff in error, which contains this statement (Transcript, page 97): "It being the intention that in selling all of the common and preferred stock of the corporation to said The R. R. Thompson Estate Co. for the sum of \$175,000.00, as aforesaid, the said Thompson Estate Co. shall thereby obtain good title to all the property and assets of said Multnomah Hotel Co. free and clear of all claims, demands, liabilities, liens or indebtedness of any character or nature whatsoever, and that any and all other such debts, liabilities, liens or indebtedness shall be assumed and paid by said I. Gevurtz & Sons, and the advance by the R. R. Thompson Estate Co. of the additional sum of \$35,000.00, shall only be as a matter of accommodation to I. Gevurtz & Sons, *and shall not be any acknowledgment of any assumption by said Thompson Estate Co. of any further liabilities, or for the payment of any greater sum for the assets of the Multnomah Hotel Co. than represented by the purchase price of the common and preferred stock.*" The very proof of claim to which this exhibit was attached showed that the Thompson Estate Co. had, in addition to paying \$175,000.00, the purchase price of the stock, and \$35,000.00, the amount of the loan, to I. Gevurtz & Sons, advanced in addition and actually paid to creditors of the Multnomah Hotel Co. some \$20,000.00, and this proof, which certainly

binds the defendant in error, as it was introduced by it over plaintiff in error's objection, not only fails to prove the allegations of the complaint, but absolutely DISPROVES the theory that the plaintiff in error assumed the obligation, which is the basis of the first cause of action in the complaint stated, and disproves as well the theory of the second cause of action which was in effect that the debts of the Multnomah Hotel Co. did not exceed \$175,000.00. All the evidence introduced was of like character.

In *National Bank vs. Grand Lodge*, 98 U. S. 123, the Supreme Court of the United States rendered what may probably be correctly termed the leading case in the Federal courts on the general proposition. In that case certain bondholders sued the Grand Lodge of A. F. & A. M. upon a resolution by which the Grand Lodge agreed to assume payment of \$200,000.00 of bonds issued by the Masonic Hall Association, provided stock be issued to the Grand Lodge by said Association to the amount of the assumption of payment by the Grand Lodge. Mr. Justice Strong, in delivering the opinion of the court, said: "We do not propose to enter at large upon a consideration of the inquiry how far privity of contract between a plaintiff and defendant is necessary to the maintenance of an action of assumpsit. The subject has been much debated, and the decisions are not all reconcilable. No doubt the general rule is that such a privity must exist. But there are confessedly many exceptions to it. One of them, and by far the most frequent one, is the case where, under a contract between two persons, assets have come to the promisor's hands

or under his control, which in equity belong to a third person. In such a case it is held that the third person may sue in his own name. But then the suit is founded rather on the implied undertaking the law raises *from the possession of the assets, than on the express promise.* (Italics our.) * * * Even as between the Association and the Grand Lodge, the latter was not bound to pay anything, except so far as stock of the former was delivered or tendered to it. The promise to pay and the promise to deliver the stock were not independent of each other. They were concurrent and dependent. Of this there can be no doubt. * * * Certainly the obligation of the Lodge was made contingent upon the issue of the stock, and the consideration for payment of the debt to the bondholders was the receipt of the stock. But the bondholders can neither deliver it nor tender it; nor can they compel the Hall Association to deliver it. If they can sue upon the contract and enforce payment by the Grand Lodge of the bonds, the contract is wholly changed, and the Lodge is compelled to pay, whether it gets the stock or not. To this it cannot be presumed the Lodge would ever have agreed. It is manifest, therefore, that the bondholders of the Hall Association are not in such privity with the Lodge and have no such interest in the contract, as to warrant their bringing suit in their own names."

In *Pennsylvania Steel Co. vs. N. Y. City Railway Co.*, 198 Fed. 749, *supra*, the court said: "It is generally held, subject to qualifications, that a third person may sue upon a promise made to another for his benefit. Sometimes the right is based by the courts upon

provisions in codes giving the 'real party in interest' the right to prosecute suits. Sometimes it is based upon the theory of a trust; the promisor being regarded as trustee for the third party. Sometimes it is based upon the theory of agency; the promisee in the contract being considered the agent of the third party, who adopts his acts in suing upon the contract. But whatever may be the correct theory, one thing is essential to the right and that is that the third person be the real promisee. It is not enough that the contract may operate to his benefit. It must appear that the parties intend to recognize him as the primary party in interest and as privy to the promise."

The only consideration which the plaintiff in error at any time ever received for its alleged promise to pay these debts (which by the way it did not make) was the transfer to it by *I. Gevurtz & Sons* of the capital stock of the *Multnomah Hotel Co.* agreed to be worth only \$175,000.00; and having paid out, as the evidence conclusively shows, in actual money a sum in excess of \$210,000.00, it neither has any funds or assets in its possession with which to pay creditors of the *Multnomah Hotel Co.*, nor could *I Gevurtz & Sons* in a direct action compel it to pay any greater sum for that capital stock than was provided for by the terms of the agreement between the parties.

The author of the article in 9 Cyc., page 380, states the rule as follows: "By the weight of authorities the action cannot be maintained merely because the third party will be incidentally benefited by performance of the contract; but he must be a party to the consideration,

or the contract must have been entered into for his benefit, and he must have some legal or equitable interest in its performance." Page 386: "To a suit by a third person upon a contract made for his benefit, a failure of consideration or a rescission of the contract by the parties thereto, before the acceptance by the plaintiff of the stipulation in his favor, is a defense."

In the note to *Linneman vs. Moross*, 39 Am. St. Rep. 531, will be found decisions from practically every state in the Union, as well as the Federal courts, on this proposition. We have read a great many of them and have been unable to find a single case holding that where the consideration fails, or where the purchaser from the original debtor has paid the full purchase price, he can be held for the debt. We have found one case expressly holding with our contention in the case at bar. In the case of *Davis vs. Dunn*, 121 Mo. App. 493, it was admitted that the buyer of a stock of merchandise had agreed to pay 80 per cent of the value of the said stock, and out of the purchase price to pay items of indebtedness due from the tenant (the seller), including a claim for rent; and it was held that when the buyer had paid debts of the tenant to the amount of more than the value of the goods without paying the rent, he was not liable for the rent claimed, although it was found that the promise of the buyer for the benefit of the landlord was an unconditional promise.

In the case of *Dewing vs. Leavitt*, 85 N. Y. 30, the writer of the opinion says: "I know of no authority to support the proposition that a person not a party to the promise, but for whose benefit the promise is made, can

maintain an action to enforce the promise where the promise is void as between the promisor and promisee for fraud, or *want of consideration*, or failure of consideration." It will certainly not be contended in the case at bar that I. Gevurtz & Sons could have compelled performance of this promise—if there was a promise—for the reason that the plaintiff in error had a perfect defense to any claim by I. Gevurtz & Sons, namely, *failure of consideration*.

In the case of *First Bank of Sing Sing vs. Chalmers*, 39 Hun, 475, the defendant had taken over from his debtor a stock of merchandise in payment of his account, and had promised to pay certain claims owed by his debtor to third parties, including the plaintiff. In that case the court said: "In the beaten way of justice there is no reason why these defendants should pay these claims. On the contrary it would be inequitable and unjust to oblige them to do so. Neither the plaintiff nor Spruce & Leary (the sellers) have parted with anything or surrendered any right."

In the case of *Jefferson vs. Asch*, 53 Minn. 447, the court after fully reviewing the New York and Massachusetts cases, says: "In every case but one, the promise was to pay a debt of the promisee, and a fund was either left or put in the hands of the promisor for the purpose," and the one exception noted was in the case of a mortgage.

Again it is held by many authorities that the right of a third party to sue is limited by the rights of the original debtor. In *Hargadine vs. Swoffert*, 65 Kan. 575, the court said: "What Kraemer could do or could not

do in an action by him against Hargadine is the test of what Swoffert can do or cannot do, because Swoffert must claim under the same contract that Hargadine would have been compelled to claim under had he brought the action."

And in *Ellis vs. Harrison*, 104 Mo. 270, the court said: "Whatever right of action a third party to such an engagement may acquire by virtue of its terms against either of the directly contracting parties, it is clear on principle that such a right cannot be broader than the party to the contract through whom the right of action is derived would have in event of its breach. To state this in another form, the right of action by an outside beneficiary for whose advantage a contract is made between two other persons, is entirely subordinate to the terms of that contract as made. Such beneficiary cannot acquire a better standing to enforce the agreement than that occupied by the contracting parties themselves."

The rule for which we are contending has been held to apply even to cases where the party suing had a specific lien on the assets. In the case of *Raethel vs. Smith*, 68 Mo. 258, the defendant purchased a certain lot of bricks which it was believed would be sufficient to enable him to pay off two mortgages against the same. He paid a certain portion to the seller, at which time it was discovered that there were not sufficient bricks under the contract price to pay both mortgages. He paid the first mortgage, and it was held in an action brought by the second mortgagee to compel satisfaction of his claim from the transaction, that the pur-

chaser, having in good faith responded to the extent of the fund in his hands, was not liable on his promise to pay the debt.

In the case of *McArthur vs. Dryden*, 6. N. D. 438, the court held that even where the State statute provided for an action by a third party on a contract made for his benefit, "the statute presupposes a valid contract between the parties that rests upon *a sufficient consideration*." (*Italics ours.*)

These and other cases, are cited with approval in *Anderson vs. Fitzgerald*, 21 Fed. 295, which adopts the reasoning in *National Bank vs. Grand Lodge*, 98 U. S. 123, and in *Sayword vs. Dexter Horton & Co.*, 72 Fed. 765 decided by this court. And from all of these cases it will be seen that the only reason for holding that the contract can be enforced is, first, that the defendant has in his hands some fund out of the proceeds of which he has agreed to pay the third party, and that this promise thus becomes his own promise, and is therefore not within the statute of frauds.

In the case of *Parker vs. Jeffery*, 26 Ore., page 189, Justice Bean, writing for the court said: "The doctrine, however, is not applicable to every contract made by one person with another, from the performance of which a third person will derive a benefit, but is limited to contracts which have for their primary object and purpose the benefit of a third person, and which were made for his direct benefit. 'To entitle him to an action,' says Mr. Justice Rapallo, 'the contract must have been made for his benefit. He must be the party intended to be benefited,' " citing with other cases *Na-*

tional Bank vs. Grand Lodge; and the Justice concludes: "From these and other authorities which might be cited we take the rule to be that to entitle a third person to recover upon a contract made by others, there must not only be an intent to secure some benefit to such third person, but the contract must have been made and entered into directly and primarily for his benefit. * * * But in nearly—if not quite in every case coming under our notice in which the action has been sustained, unless on a bond or obligation authorized by law, there has been some property, fund, debt, or thing in the hands of the promisor upon which the plaintiff had some equitable claim, and from which the law, acting upon the relation of the parties, or the fund, established the privity, implied the promise, and created the duty upon which the action was founded."

Again, in the case of *Washburn vs. The Investment Co.*, 26 Ore. 436, the Supreme Court, through Mr. Justice Bean, had the following to say, page 442: "After a somewhat exhaustive examination of the question, we have found no case which has gone so far as to hold that such action can be maintained on an executory contract by which one person promises to advance his own money to pay the debts of another, but, on the contrary, the authorities deny the application of the rule to such a contract." Citing *Bank vs. Grand Lodge* and other cases * * * page 443: "But where there is no such fund, debt, or obligation in the hands of, or owing from the promisor, but only an executory contract by one person to advance his own money to pay the debts of another, who is a party to neither the contract or con-

sideration, *it is difficult to see upon what principle the doctrine can be applied.*" (Italics ours.) In the case under consideration by the court the contract between the defendant and the original debtor was an agreement that the defendant would advance its own funds for the purpose of paying the debts of the leather company, which advance, when made, should be repaid by a certain amount of the capital stock of the leather company, and the cancellation of a subsidy contract entered into between the parties, and the court said, pages 443-4: "It was, in effect, an agreement by the defendant to advance to the leather company money with which to pay its debts, and take in satisfaction thereof its stock. If such a contract can be enforced by the plaintiff, then every contract by which one person promises or agrees with another, for a consideration moving from him, to advance money to pay his debts, can be enforced by the parties whose debts were thus to be paid. We do not understand any case to have gone to that extent. * * * The creditors may have had, and no doubt did have, an interest in the performance of the contract, as they would have had in the performance of an agreement by which any person should undertake to lend or advance money to the leather company to enable it to pay its debts, but this is a very different thing from the interest necessary to enable them to enforce the contract by actions in their own names."

We have quoted from the last cited case quite freely because of the conviction that a close examination of that case will reveal the fact that in principle the case at

bar is on all fours with it. In that case there was a contract between the parties that the defendant Investment Co. would advance money to pay the leather company's debts, and in consideration thereof the defendant was to receive capital stock of the leather company. It was conceded that the defendant had promised the leather company to assume and pay its debts, which makes it a much stronger case than the case at bar, for the reason that there was no promise by the plaintiff in error to pay the debts of either I. Gevurtz & Sons or the Multnomah Hotel Co. On the contrary the evidence conclusively shows that the plaintiff in error had no intention of being so bound, and certainly the courts will not go to the extent of making an entirely new contract between the parties. But if it be conceded that the plaintiff in error did promise I. Gevurtz & Sons to pay the debts of the Multnomah Hotel Co. inasmuch as it received no consideration for that promise, and the same was executory, and not in writing, there can be no recovery in a suit by one of the Hotel Company's creditors.

In the case of *Brower Lumber Co. vs. Miller*, 28 Ore. 570, the learned District Judge who tried the case at bar, in writing the opinion for the Supreme Court of Oregon, quoting from the opinion of *Jefferson vs. Asch*, 53 Minn. 447, said: "To give a third party who may derive a benefit from the performance of the promise an action, there must be—*first*, an intent by the promisee to secure some benefit to the third party; and, *second*, some privity between the two—the promisee and party to be benefited—and some obligation or duty owing from

the former to the latter, which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally." "There must be either a *new consideration*, or some prior right or claim against one of the contracting parties, by which he has a legal interest in the performance of the agreement; and "there must be some legal right, founded upon some obligation of the promisee, in the third party, to adopt and claim the promise as made for his benefit." The author quotes the opinion of Mr. Justice Bean in *Parker vs. Jeffery*, 26 Ore. and also the *Washburn Case*, 26 Ore., and concludes that there could be no recovery in that case, although the question squarely presented was whether material men could recover upon a provision in the bond of a street contractor to the city, that he, the contractor, would pay all money due and to become due for materials used and labor performed in completing his work, and held that there was no fund or property provided in the hands of the promisor on which they, the laborers, could have any equitable claim.

Again in the case of *Feldman vs. McGuire*, 34 Ore., 309, wherein the learned District Judge, in discussing the same principle, on behalf of the Supreme Court of the State of Oregon, in a case where the question of the statute of frauds was involved, after a holding that the case did not come within the Statute of Frauds (page 313), said: "It is pertinent to add that the question whether the promisor *has received money or property in consideration of the promise has, in general, been regarded as a controlling circumstance or factor in the transaction.*" (Italics ours.)

We have proceeded thus far in this argument on the assumption that the plaintiff in error did actually assume the debt due the defendant in error from the Multnomah Hotel Co., Philip Gevurtz and I. Gevurtz & Sons, and believe we have demonstrated that the defendant in error could not recover on that theory, but let us now with particular reference to the seventh specification of error, consider the evidence introduced with a view of determining how far short the same falls of establishing any such fact in this case. We find that the entire record and the only evidence introduced to support defendant in error's complaint is the writings between I. Gevurtz & Sons and the plaintiff in error, the opinion of the referee in bankruptcy as to the allowance of plaintiff in error's claim against the bankrupt estate of I. Gevurtz & Sons, a stipulation between the attorneys for plaintiff in error and the attorneys for the trustee in bankruptcy of I. Gevurtz & Sons, a memorandum of authorities by the attorneys for plaintiff in error in the bankruptcy proceedings of I. Gevurtz & Sons, and the schedules in bankruptcy of the Multnomah Hotel Co., and we assert with firm conviction that this evidence not only fails to disclose any assumption of the defendant in error's debt, but absolutely negatives such a proposition. The option which ripened into an agreement between I. Gevurtz & Sons and the plaintiff in error constituted the actual contract, its terms are as clear, direct and explicit as the English language could make it. Therein it is set forth that the consideration for the sale of the common and preferred stock of the Multnomah Hotel Co. by

I. Gevurtz & Sons to the plaintiff in error should be \$175,000.00; that the plaintiff in error should have the right in paying said sum to apply the same toward the payment of the indebtedness of the Multnomah Hotel Co. to the First National Bank of Portland, and to all other creditors of said company to the extent of said sum of \$175,000.00, *and any and all other liabilities or indebtedness of said Multnomah Hotel Co. up to the date of the transfer of stock shall be paid, satisfied and discharged by I. Gevurtz & Sons.* (Italics ours.). The option then provided that in case I. Gevurtz & Sons were unable to meet these additional payments that the plaintiff in error would advance the sum of \$35,000 to I. Gevurtz & Sons, taking its note therefor, and further, that the said I. Gevurtz & Sons should indemnify plaintiff in error against all further claims or demands, actions, damages, liabilities, suits, fines, liens, contracts or indebtedness of any character whatsoever, either due to I. Gevurtz & Sons directly or indirectly, or to any other person, firm or corporation, arising out of or incurred in the operation of said Multnomah Hotel from the time of its beginning to the date of delivery of possession of the capital stock. And then to save any question as to whether the plaintiff in error did assume any debts in excess of the purchase price, the parties provided expressly that the advance of the \$35,000 "shall not be any acknowledgment of any assumption by said Thompson Estate of any further liability, or for the payment of any greater sum for the assets of the Multnomah Hotel Co. than represented by the purchase price of the common and preferred stock." (Pages 96, 97 and 98 of the Transcript.)

The promissory note given by I. Gevurtz & Sons to plaintiff in error, and introduced in evidence, only confirms the agreement, and proves that the additional sum of \$35,000.00 was advanced only as a matter of accommodation to I. Gevurtz & Sons. The guaranty of I. Gevurtz & Sons to Thompson Estate Co. expressly bound I. Gevurtz & Sons to pay any indebtedness or liabilities remaining unpaid or in excess of \$210,000.00, the aggregate amount of the purchase price and the loan (page 101, Transcript). The minutes of the meeting of the board of directors of I. Gevurtz & Sons recited the contract and declared that one of the conditions of the sale of the stock was that I. Gevurtz & Sons should pay all liabilities or indebtedness of the said Multnomah Hotel Co. up to the date of the transfer of the stock, and should warrant and guarantee the plaintiff in error against any and all indebtedness and liabilities over and above the aggregate amounts of the purchase price and the loan, and that the loan of \$35,000.00 should only be considered as a matter of accommodation and not any acknowledgment of any assumption by the plaintiff in error of any further liability, and that the option should be adopted and become a binding and valid contract. The sworn proof of claim in bankruptcy filed by the plaintiff in error in the matter of the estate of I. Gevurtz & Sons recited by way of exhibit the accounts payable which it is sworn was assumed *and agreed to be paid by the bankrupt I. Gevurtz & Sons*, and showed the account of the defendant in error unpaid (pages 84, 95 of the Transcript). Then there was introduced in evidence over plaintiff in error's objection,

a stipulation that the claim be allowed for \$57,560.04, which was some \$22,500.00 more than had been agreed to be paid by the Thompson Estate Co., or advanced by it, and the brief of the attorneys for plaintiff in error before the referee, which must certainly be held to bind the defendant in error who introduced it over objection, contains the express statement that the plaintiff in error paid the sum of \$175,000.00, and advanced the \$35,000 by way of loan.

Then there was introduced in evidence the dividend sheets of I. Gevurtz & Sons in bankruptcy, which showed the allowance of plaintiff in error's claim and payments thereunder, and next was introduced the schedule in bankruptcy of the Multnomah Hotel Co., which showed that the defendant in error was a creditor of that company in the sum of \$3,500.00, and that no other person was liable for its payment, and indeed, it is admitted by the testimony of Mr. Wessinger and by the allegations in the defendant in error's complaint, that subsequent to the transactions resulting in this litigation, the defendant in error looked to the Multnomah Hotel Co. for the payment of its debt, and actually collected one note of \$1,500.00 in full, and \$1,000.00 upon the note here sued on (see paragraph IV of the complaint, page 16 of the Transcript, and the testimony of Mr. Wessinger at page 75 of the Transcript). And to add additional weight to the mass of evidence already introduced disproving defendant in error's contention counsel secured from the writer the admission that under a book entry in the books of the Multnomah Hotel Co., wherein the defendant in error is scheduled as a cred-

itor of that company, somebody, presumably Mr. Yates, who was then the president and general manager of the Multnomah Hotel Co., wrote: "We assume payment of the following notes." It is impossible to determine in advance what counsel will claim for this admission, but it is certain that it cannot be successfully contended that it proves the assumption of this debt by the plaintiff in error.

We cannot conceive of a case where to compel payment of a creditor's claim by the purchaser of the assets of that creditor's debtor, would work a greater hardship than in the instant case. The plaintiff in error purchased certain capital stock for \$175,000.00. In good faith it paid all the stock was worth. In order to help out the creditors of the Multnomah Hotel Co. and of I. Gevurtz & Sons it advanced and loaned to I. Gevurtz & Sons \$35,000.00 in actual cash, and it appears from the evidence that it lost 77 per cent of that loan. In addition it paid claims against the Multnomah Hotel aggregating some \$20,000.00, and it lost 77 per cent of those advances. In other words it received \$175,000.00 of assets and after deducting all dividends from the bankrupt estate of I. Gevurtz & Sons, paid over \$218,000.00 in cash therefor. On the other hand, the defendant in error, having a claim against the Multnomah Hotel Co., Philip Gevurtz and I. Gevurtz & Sons, consisting of two notes for \$6000.00, has received \$2500.00 in cash from the Multnomah Hotel Co., and something more than two and a half years after it alleges plaintiff in error assumed its debt, undertakes to saddle this old responsibility off onto the plaintiff in

error by evidence which we respectfully insist demonstrates that it has no legal claim, and that its rights of a moral or equitable nature are "thinner than the memory of a forgotten dream." For all of which reasons it is urged that the judgment of the District Court should be reversed and one here entered dismissing the defendant in error's bill.

BAUER & GREENE and
A. H. McCURTAIN,
Attorneys for Plaintiff in Error.

IN THE

United States Circuit Court of Appeals

FOR THE
NINTH CIRCUIT

THE R. R. THOMPSON ESTATE COMPANY,
a corporation,

Plaintiff in Error,

vs.

LOUISE WEINHARD and ANNA WESSINGER,
PAUL WESSINGER and HENRY WAGNER,
Executrices and Executors, respectively of
the Last Will and Testament of Henry Wein-
hard, Deceased,

Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

TEISER & SMITH and
JULIUS SILVERSTONE,

Attorneys for Defendants in Error.

BAUER & GREENE and A. H. McCURTAIN,

Attorneys for Plaintiff in Error.

Filed

OCT 4 - 1917

F. D. Monckton,

Clerk

CONTENTS

OF

BRIEF ON BEHALF OF DEFENDANTS IN ERROR

In the Order in Which the Questions are Discussed.

	Pages
I. Assignments and Specifications of Error by Plaintiff in Error	5- 6
II. Statement of Facts	6- 9
III. Contentions of Plaintiff in Error.....	9-10
IV. Position of Defendants in Error.....	10-11
V. Points of Law	11-17
VI. Argument	17
(A) Evidence of Assumption of Indebtedness by Thompson Estate	18
(1) Was there an Assumption of the Entire Indebtedness	18-19
(a) Proof of Claim in Bankruptcy.....	19-26
(b) Brief of R. R. Thompson Estate Company in Support of Claim.....	26
(c) Referee's Order Allowing Claim.....	26-27
(d) Dividends Received	27-29
(2) Was the Indebtedness of Multnomah Hotel Company in Excess of \$175,000.00....	29-32
(B) Can a Third Party for Whose Benefit a Promise or Contract is Made Between Two Others Sue Thereon in His Own Name?.....	32-35
(C) Statute of Frauds	35
(1) The Assumption Agreement is not within the Statute	35-36
(2) Proof of Claim and Brief such Memoranda as Required by Statute.....	36-37
(3) Question not Reviewable.....	37-38
(D) Other Questions not Reviewable.....	38-42
(E) Discussion of Authorities Relied upon by Plaintiff in Error	42-61
(F) Conclusion	61-63

IN THE
**United States Circuit Court
of Appeals**

FOR THE
NINTH CIRCUIT

THE R. R. THOMPSON ESTATE COMPANY, }
a corporation,

Plaintiff in Error,

vs.

LOUISE WEINHARD and ANNA WESSINGER, }
PAUL WESSINGER and HENRY WAGNER,
Executrices and Executors, respectively of
the Last Will and Testament of Henry Wein-
hard, Deceased,

Defendants in Error. }

BRIEF OF DEFENDANTS IN ERROR.

**I. Assignments and Specifications of Error
By Plaintiff in Error.**

Counsel for Defendants in Error, at the outset of this brief, respectfully calls to the attention of the court the fact that Specifications of Error, appearing in the brief on behalf of Plaintiff in Error (pp. 14 and 15), and the Assignments of Error, filed in the District Court (Transcript, pp. 54 to 57), do not correspond

or harmonize, either in form, substance or numbering, and for that reason it is somewhat difficult to answer connectedly the brief of Plaintiff in Error.

“The Circuit Courts of Appeals have repeatedly called the attention of counsel to the absolute necessity of adhering strictly to the terms of rule 11, concerning ‘Assignments of Errors,’ and to subdivision 2 of rule 24, in relation to ‘Briefs.’” * * *

“The object of the rules is to so present the matter raised by the assignment of error that this court may understand what the question is it is called upon to decide without going beyond the assignment itself, and also that the party excepting may be confined to the objection taken at the time, which must then have been stated specifically.” * * *

Walton v. Wild Goose Mining & Trading Co.,
(C. C. A. 9th Cir.) 123 Fed. 209, 210.

Migeon v. Montana C. R. Co., 77 Fed. 249.

II. Statement of Facts.

It is believed advisable to detail briefly the facts, since the statement of facts contained in the brief of Plaintiff in Error, consisting of some ten pages, contains so much extraneous matter, much of it off record, and the correctness of which the Defendants in Error are not prepared to accept, that it may be difficult for this court to cull conveniently the essential facts therefrom.

The plaintiff below, which for convenience will be denominated the Weinhard Estate, brought an action to recover against the defendant, The R. R. Thompson Estate Company, upon a promissory note executed by the Multnomah Hotel Company, a corporation, I. Gevurtz & Sons, a corporation, and Philip Gevurtz, of which the hotel company was the principal and the other two parties were accommodation makers. Philip Gevurtz was president of I. Gevurtz & Sons and of the Multnomah Hotel Company.

At the time of the making of the note, The R. R. Thompson Estate Company was the owner of the Multnomah Hotel property in Portland, Oregon, and the Multnomah Hotel Company was the lessee of the hotel from it. I. Gevurtz & Sons were the owners of practically all of the common and preferred stock of the hotel company.

Thereafter, in January, 1913, I. Gevurtz & Sons and the hotel company became financially embarrassed, and The R. R. Thompson Estate Company, in order to protect its property, obtained from I. Gevurtz & Sons an option, dated January 10, 1913, whereby I. Gevurtz & Sons agreed that The R. R. Thompson Estate Company should have the right to purchase all the capital stock of the hotel company for \$175,000, said sum to be applied by The R. R. Thompson Estate Company to the payment of the debts of the Multnomah Hotel Company, and all the debts in excess of that amount to be discharged immediately by I. Gevurtz & Sons, but upon their inability so to do, The R. R. Thompson Estate Company should advance to I. Gevurtz & Sons \$35,000 upon I. Gevurtz & Sons giving to The R. R. Thompson Estate Company their note in that amount, and should disburse such sum to the creditors of the hotel company; and I. Gevurtz & Sons

were further required to give to The R. R. Thompson Estate Company its Contract of Indemnity against the payment of debts and liabilities of the Multnomah Hotel Company in excess of \$210,000 (\$175,000 plus \$35,000).

The transaction was speedily consummated upon the terms set forth in this option, and there was delivered to The R. R. Thompson Estate Company the capital stock and the note and Contract of Indemnity referred to, and it took possession of the stock and hotel properties.

Soon thereafter I. Gevurtz & Sons were adjudged bankrupt, and on the 29th day of May, 1913, The R. R. Thompson Estate Company presented its Proof of Claim against the estate of the bankrupt in that proceeding, basing its demand upon the promissory note of \$35,000, and the Contract of Indemnity of I. Gevurtz & Sons, and setting forth the liabilities of the Multnomah Hotel Company which it was claimed that they had paid or assumed, and among the liabilities so claimed to have been assumed was that of the Weinhard Estate upon the note here sued upon.

Subsequently an amended Proof of Claim was filed by The R. R. Thompson Estate Company, setting forth the same facts, but enlarging thereon somewhat. From the language of this Proof of Claim and the decision of the referee it is presumed that the amended Proof of Claim was filed by agreement between counsel for trustee and The R. R. Thompson Estate Company after the decision of the referee was verbally rendered. However, the amended Proof of Claim and the original Proof of Claim, so far as this proceeding is concerned, present no new or different question. (This is here stated, since from the language of counsel for Plaintiff in Error on

page 10 of its brief, it might be inferred by the court—although it is assumed that counsel did not intend it to be thus inferred—that the amended Proof of Claim modified the former position of The R. R. Thompson Estate Company so far as the questions here involved are considered.)

The trustee in bankruptcy in that proceeding contested the claim, and The R. R. Thompson Estate Company maintained the position that its claim was allowable. The referee, after a hearing, allowed the claim in the full amount asked (excepting some \$2900.00 which had been stipulated between the attorneys should not be allowed, and which has no bearing on the issues in this case).

Thereafter a dividend was declared, and The R. R. Thompson Estate Company received the sum of \$13,237.88, or 23% of the amount claimed, which amount included, of course, a dividend upon the amount of the note here sued upon, and they are still entitled to receive such further dividends in the estate as are declared from time to time.

III. Contentions of Plaintiff in Error.

The contentions of Plaintiff in Error, made in the lower court and also made here, are:

First. That the R. R. Thompson Estate Company did not assume the indebtedness of the Multnomah Hotel Company in excess of \$175,000, and that it did not assume the debt due the Weinhard Estate.

Second. That even though it did assume the in-

debtedness of the Multnomah Hotel Company, including the debt due the Weinhard Estate, the Weinhard Estate could not recover in a suit against it, since it was a third or outside party to the transaction, and

Third. That even though such suit was maintainable, the contract was not in writing and was therefore not enforceable by reason of the statute of frauds.

(Another contention was made in the pleadings by the defendant below, The R. R. Thompson Estate Company, namely, that the note, which is the subject of this suit, was signed only by the president of the Multnomah Hotel Company, and that the by-laws of the Multnomah Hotel Company provided that it should be signed by both the president and the treasurer, to which a reply was interposed to the effect that the Multnomah Hotel Company, having received the consideration therefor, to-wit: \$4500, it was estopped from setting up the want of authority. This contention, however, the Plaintiff in Error waived at the trial).

IV. Position of Defendants in Error.

The position of the Defendants in Error is:

First. That The R. R. Thompson Estate Company did assume the indebtedness of the Multnomah Hotel Company, including that of plaintiff's.

Second. That it received a valuable consideration for the assumption from the original party to the transaction, to-wit: the capital stock of the Multnomah Hotel Company, which carried with it the assets of the

hotel company, free of indebtedness, the note of \$35,000 and the Contract of Indemnity.

Third. That a suit under such circumstances is maintainable by the Weinhard Estate against the R. R. Thompson Estate Company, and

Fourth. That such transaction is without the statute of frauds, and that there were written memoranda of the assumption signed by the party to be charged.

Fifth. That, moreover, the debts of the Multnomah Hotel, according to the contention of Plaintiff in Error made before the Court of Bankruptcy, did not exceed \$175,000.

At the trial of the cause in the District Court, a jury was waived. After hearing the evidence of plaintiff below, *the defendant introducing no evidence whatever*, the court found generally in favor of the plaintiffs, and refused in its discretion to make special findings tendered by the defendant below, which refusal to make the special findings tendered, defendant duly objected to, and the exceptions were allowed.

V. Points of Law.

For the purpose of convenience, a summary statement of the law applicable to the questions involved herein, will be stated, with the citation of authorities substantiating them.

I.

ON A TRIAL OF AN ACTION AT LAW, WITHOUT THE INTERVENTION OF A JURY, UNDER REV. STAT. SEC. 649, IT IS DISCRETIONARY WITH THE COURT TO MAKE EITHER GENERAL OR SPECIAL FINDINGS; AND THE EXERCISE OF THIS DISCRETION IS NOT THE SUBJECT OF REVIEW.

School Dist. No. 11 v. Chapman (C. C. A. 8th Cir.), 152 Fed. 887, 895; 205 U. S. 545; 51 L. Ed. 932; 27 Sup. Ct. 792 (certiorari denied).

State Bank v. Smith (C. C. A. 5th Cir.), 94 Fed. 605, 608.

Mercantile Ins. Co. v. Folsom, 18 Wall. 237, 238; 21 L. Ed. 827, 832.

II.

WHEN A JURY IS WAIVED AND THE CAUSE IS TRIED BY THE COURT, THE GENERAL FINDINGS OF THE COURT FOR ONE OR THE OTHER OF THE PARTIES, STAND AS A VERDICT OF A JURY AND MAY NOT BE REVIEWED IN AN APPELLATE COURT, UNLESS THERE IS ABSENCE OF SUBSTANTIAL EVIDENCE TO SUSTAIN IT, AND THEN ONLY UPON PROPER MOTION BEFORE THE TRIAL COURT.

Pennsylvania Casualty Co. v. Whiteway (C. C. A. 9th Cir.), 210 Fed. 782, 784.

Martinton v. Fairbanks, 112 U. S. 670; 5 Sup. Ct. 321; 28 L. Ed. 862.

Boardman v. Toffey, 117 U. S. 271, 6 Sup. Ct. 734; 29 L. Ed. 898.

Dunsmuir v. Scott, 217 Fed. 200, 202 (C. C. A. 9th Cir.).

Sierra Land & Live Stock Co. v. Desert Power & P. Co. (C. C. A. 9th Cir.), 229 Fed. 982.

Lehnen v. Dickson, 148 U. S. 71; 13 Sup. Ct. 481; 37 L. Ed. 373.

Buetell v. Magone, 157 U. S. 154; 58 Sup. Ct. 566; 39 L. Ed. 654, 655.

National Surety Co. v. Cincinnati etc. Ry. Co., (C. C. A. 6th Cir.), 145 Fed. 34, 35.

Delaware L. & W. R. Co. v. Rutter, et al, 147 Fed. 51.

Delaware L. & W. R. Co. v. Kutter, et al, 147 776; 203 U. S. 588; 51 L. Ed. 330 denying writ of certiorari in above case.

III.

THE RIGHT OF A THIRD PERSON TO MAINTAIN ASSUMPSIT UPON A CONTRACT, THE PERFORMANCE OF WHICH WILL INURE TO HIS BENEFIT, BUT TO WHICH HE IS NOT A PARTY, IS THE PREVAILING RULE IN THIS COUNTRY AND THE SETTLED LAW OF OREGON.

or otherwise stated

WHERE ONE PERSON PROMISES ANOTHER FOR A CONSIDERATION MOVING FROM HIM, TO PAY OR DISCHARGE SOME LEGAL OBLIGATION OR DEBT DUE FROM SUCH OTHER TO A THIRD PERSON, THE LATTER, ALTHOUGH A STRANGER TO THE CONTRACT, MAY MAINTAIN AN ACTION THEREON.

Hendricks v. Lindsey, 93 U. S. 143; 23 L. Ed. 855, 857.

Union Life Ins. Co. v. Hanford, 143 U. S. 187; 36 L. Ed. 118, 120.

Feldman v. McGuire, 34 Or. 309; 55 Pac. 872.

Oregon Mill Co. v. Kirkpatrick, 66 Or. 21, 24; 133 Pac. 69.

Baker City M. Co. v. Idaho C. P. T. Co., 67 Or. 372, 377; 136 Pac. 23.

Miles v. Bowers, 49 Or. 429, 434; 90 Pac. 905.

Washburn v. Investment Co., 26 Or. 436.

Baker v. Eglin, 11 Or. 333; 8 Pac. 280.

Hughes v. Ore. R. & N. Co., 11 Or. 437; 5 Pac. 206.

Schneider v. White, 12 Or. 503; 8 Pac. 652.

Strong v. Kann, 13 Or. 172.

Chrisman v. State Ins. Co., 16 Or. 283; 18 Pac. 860.

Rea v. Barker (Cir. Ct. Ore.), 135 Fed. 890.

Lord's Oregon Laws, Sec. 27.

III (a).

OF COURSE THE CONTRACT MUST BE EXECUTED AND NOT EXECUTORY.

Second Natl. Bank v. Grand Lodge, 98 U. S. 123.

Pope v. Porter, 33 Fed. 79.

In re Halstead Co., 204 Fed. 115, 118.

Washburn v. Investment Co., 26 Or. 436, 442-443.

Brower Lbr. Co. v. Miller, 28 Or. 565, 572; 43 Pac. 659.

III (b).

AND THE CONTRACT MUST BE MADE DIRECTLY
AND PRIMARILY FOR THE BENEFIT OF THE THIRD
PARTY.

Parker v. Jeffrey, 26 Or. 186, 191; 37 Pac. 712.

Washburn v. Investment Co., 26 Or. 436, 441;
36 Pac. 532; 38 Pac. 621.

Feldman v. McGuire, 34 Or. 309.

Baker City M. Co. v. Idaho C. P. Co., 67 Or.
372, 377.

Brower Lbr. Co. v. Miller, 28 Or. 565, 572; 43
Pac. 659.

Barker v. Pullman Co., 124 Fed. 555, 566-8.

Gibson v. Victor Talking Mach. Co., 232 Fed.
225, 232.

Oregon Mill Co. v. Kirkpatrick, 66 Or. 21, 24.

Sayward v. Dexter-Horton Co. (C. C. A. 9th
Cir.), 72 Fed. 758, 765.

Moore v. Ouray First Natl. Bank (Col.), 10
L. R. A. (N. S.) 260, 263.

Jenkins v. Chesapeake & O. R. Co., 49 L. R. A.
(N. S.) 1166, 1179.

IV.

WHERE ONE HAS PURCHASED PROPERTY OF A DEBTOR AND IN CONSIDERATION FOR THE PURCHASE HAS ASSUMED THE DEBT DUE TO A THIRD PERSON, THE OBLIGATION OF THE PURCHASER TO THE THIRD PERSON IS NOT WITHIN THE STATUTE OF FRAUDS.

Strong v. Kann, 13 Or. 172.

Feldman v. McGuire, 34 Or. 309, 312.

Kiernan v. Kratz, 42 Or. 474, 478; 69 Pac. 1027.

Miller v. Beck, 72 Or. 141, 147; 142 Pac. 603.

IV (a).

THE MEMORANDUM REQUIRED BY THE STATUTE OF FRAUDS IS NOT REQUIRED TO BE IN ANY PARTICULAR FORM NOR TO CONTAIN APT WORDS OF CONTRACT. IT MAY BE MADE AFTER THE ACTUAL CONTRACT WAS ENTERED INTO AND WITH A PURPOSE ENTIRELY OTHER THAN TO EVIDENCE THE AGREEMENT.

Fisk v. Henarie, 13 Or. 156, 171.

St. Louis Ry. Co. v. Beidler, 45 Ark. 17.

Spangler v. Danforth, 65 Ill. 152.

V.

UNDER A RULE OF THE CIRCUIT COURT, REQUIRING THAT ASSIGNMENTS OF ERROR SHALL SET OUT SEPARATELY AND PARTICULARLY EVERY ERROR ASSERTED AND INTENDED TO BE URGED, THE MERE GENERAL ASSIGNMENT THAT JUDG-

MENT WAS RENDERED FOR THE WRONG PARTY IS NOT A COMPLIANCE WITH THE RULE, AND IN THE ABSENCE OF PLAIN ERROR IN THE RECORD WILL BE DISREGARDED.

Deering Harvester Co. v. Kelly (C. C. A. 6th Cir.), 103 Fed. 261, 264.

VI.

WHERE NO REASON OR GROUND IS ASSIGNED FOR OBJECTION TO EVIDENCE AND NONE IS SO MANIFEST THAT THE TRIAL COURT COULD NOT FAIL TO UNDERSTAND IT, THE OBJECTION IS PROPERLY OVERRULED.

Deering Harvester Co. v. Kelly (C. C. A. 6th Cir.), 103 Fed. 261, 264.

Migeon v. Montana C. R. Co. (C. C. A. 9th Cir.), 77 Fed. 249, 252.

VI. Argument.

As heretofore intimated, the discussion of the questions before this court for review is so commingled by Plaintiff in Error in its brief, that in order to discuss them clearly it is first necessary to segregate them from the jumbled mass. We have attempted fairly to do this under the head of "Contentions of Plaintiff in Error," and in the discussion following shall adhere to the classification there made.

Proceeding then to the discussion, let us consider the *First Contention* that there was no assumption of

the indebtedness of the Multnomah Hotel Company in excess of \$175,000.

(a) Evidence of Assumption of Indebtedness by the R. R. Thompson Estate Co.

The consideration of this question involves two phases—(1) *Was there an assumption of the entire indebtedness*, and (2) the assumption of \$175,000 of indebtedness being conceded: *Was the indebtedness of the Multnomah Hotel Company in excess of \$175,000?*

(1) Was There an Assumption of the Entire Indebtedness?

The District Court *found generally* in favor of the Weinhard Estate, plaintiffs below, and *refused to make special findings*, and as has been set forth under Legal Point I, the ruling so to find, and the refusal to find specially, was a proper exercise of judicial discretion and in this regard is not subject to review in the appellate court.

The correctness of the general finding in favor of the Weinhard Estate, plaintiffs below, has every presumption in its favor here. *It stands as the verdict of a jury, and will not be reviewed unless there is a total absence of substantial evidence to sustain it.* This court has lately passed upon this question, and other authorities are set forth under Legal Point II.

In the case of *Pennsylvania Casualty Co. v. White-*

way (C. C. A. 9th Cir.), 210 Fed. 782, 784, Circuit Judge Gilbert said:

“When an action at law is tried before a jury, their verdict is not subject to review unless there is absence of substantial evidence to sustain it, and even then it is not reviewable unless a request has been made for a peremptory instruction, and an exception taken to the ruling of the court. When a jury is waived, and the cause is tried by the court, the general finding of the court for one or the other of the parties stands as the verdict of a jury, and may not be reviewed in an appellate court unless the lack of evidence to sustain the finding has been suggested by a request for a ruling thereon, or a motion for judgment, or some motion to present to the court the issue of law so involved, before the close of the trial.”

Assuming, therefore, that appropriate motion was made by the defendant below, it will be seen that if there be any substantial evidence of the assumption of all the indebtedness of the Multnomah Hotel Company by The R. R. Thompson Estate Company, this fact will not be reviewed.

What evidence, therefore, was there of an assumption of the indebtedness? In this connection, the court's attention is called to the

(A) Proofs of Claim in Bankruptcy.

It will be recalled that proofs of claim were filed by The R. R. Thompson Estate Company—an original

proof and an amended proof -(Transcript, pp. 77-81, and 81-118), with the Referee in Bankruptcy in the Estate of I. Gevurtz & Sons, bankrupt, against said estate, claiming as due to it some \$60,000 by reason of the debts of the Multnomah Hotel Company paid and assumed. Amongst the debts paid or assumed making up this claim of approximately \$60,000 was the debt of the Weinhard Estate, based on the note sued upon (Transcript, p. 93). It is true this claim was not asserted to have been paid; in fact, it was asserted to have not been paid, but all the more, it was claimed to have been assumed or it would have had no place in the Proofs of Claim, upon which dividends were demanded and received by the Thompson Estate.

In the brief of Plaintiff in Error (pp. 22, 23), capital is endeavored to be made by it out of the fact that "a detailed statement of all claims, liabilities and demands due and owing from the Multnomah Hotel Company and *assumed and agreed to be paid by said bankrupt*" is attached to the Proof of Claim (Transcript, pp. 79 and 84), and it is argued from this by Plaintiff in Error in its brief, that, since the statement shows the account of the Weinhard Estate to consist of two notes for \$1500 and \$4500, respectively, this establishes the fact that Plaintiff in Error did not assume or agree to pay the Weinhard Estate claim.

It is impossible to follow this reasoning. It is assumed that what was intended was that, since the statement showed that these notes were not then paid by The R. R. Thompson Estate Company, there was no claim asserted for the repayment of that amount.

A list of claims was filed, which *were assumed and agreed to be paid*. There is set forth in this list numerous claims paid, some by direct payment, some by notes

(Transcript, p. 93) and still another by taking over of a contract, or executing a new one (Transcript p. 94), and others are set forth under Trade Accounts Payable (Transcript, p. 89), under Sundry Accounts Payable (Transcript, p. 89), and under Bills Payable & Interest (Transcript, p. 89 and pp. 92-94) as not paid, and among the latter class that of the Weinhard Estate and of the National Cash Register Company, the latter two claims amounting to \$6910.25. In other words, the detailed statement upon which the Proof of Claim was based, sets forth two classifications, namely, claims paid either in cash or otherwise and claims assumed, but not then paid, and that this interpretation was placed upon it, both by The R. R. Thompson Estate Company and by the Referee in Bankruptcy, is most positively shown by the fact that dividends were allowed to The R. R. Thompson Estate Company upon the debts assumed but not paid by it, as well as upon the debts paid by it, and dividends were thus accordingly received by The R. R. Thompson Estate Company.

The form in which the statement appears in the Transcript (pp. 89 and 90) is, not particularly conducive to clearness, due to the fact that the statement is extended over several pages, and the eye does not follow it as it would on the original statement were it set forth on one page. The fact is, however, as will be seen from a close examination of this statement, that the total liabilities of the Multnomah Hotel Company at the date of the purchase by The R. R. Thompson Estate Company were \$243,912.62 (Transcript, p. 90) from which is deducted the sum of \$9473.20, the amounts collected by The R. R. Thompson Estate Company from accounts receivable by the Multnomah Hotel Company at the time The R. R. Thompson Estate Company took over the stock and assets, as set forth in

Exhibits "E" and "F" (Transcript, p. 95), leaving a net sum paid and assumed of \$234,439.42. From this amount is deducted \$175,000 paid by The R. R. Thompson Estate Company at the time of the transfer, leaving a balance of \$59,439.42, plus interest charged thereon of \$1050.00, or \$60,489.42, the amount for which the Proof of Claim was filed and allowed, less a stipulated deduction, having nothing to do with the issues in question.

The total liabilities of the Multnomah Hotel Company, as set forth on page 90 of the Transcript, are made up of (A) Accrued Wages, (B) Accounts Payable, (C) Sundry Accounts Payable and (D) Bills Payable and Interest; and under the latter classification of Bills Payable and Interest is included the account of the Weinhard Estate. These items total \$243,912.62; and there is shown a balance due on said Trade Accounts Payable of \$291.80; on Sundry Accounts \$2240.11 and on Bills Payable and Interest of \$6910.25, totaling a balance due of \$9442.16, and an amount paid of \$234,407.46, these two sums (\$234,407.46 and \$9442.16) being \$243,912.62, the amount of the alleged Total Indebtedness. But it will be noted that there was not deducted from the claim filed the balance due and unpaid upon any of these accounts payable or bills payable, and the only deduction made by The R. R. Thompson Estate Company in its Proof of Claim from the said total indebtedness of \$243,912.62 was the sum of \$9473.20, collected by it from accounts due to the Multnomah Hotel Company (which accounts, in fact, according to the agreement between the parties, should have been applied on the note, and interest to that extent should not have been allowed thereon, although this has no bearing on the issues in question).

Again, a conclusive and most striking evidence of

the fact that there was an assumption of the entire indebtedness is seen in the following: From the Minutes of Meeting of I. Gevurtz & Sons (Exhibit "J" attached to the Proof of Claim), it will be noted that the directors of I. Gevurtz & Sons were Philip Gevurtz, Alex. Gevurtz, Matthew Gevurtz, Louis Gevurtz and I. Gevurtz (Exhibit "J," Transcript, p. 103). In the original Proof of Claim filed (pp. 80, 81, Transcript) and in the Amended Proof filed (pp. 84 and 85, Transcript), it is set forth that in addition to the liabilities exhibited and shown by the various exhibits attached to said Proof of Claim, there appeared on the original books of the Multnomah Hotel Company claims in favor of Philip Gevurtz in the sum of some \$4,000, Alex Gevurtz in the sum of some \$1300, and Louis Gevurtz in the sum of some \$1300, aggregating the sum of \$., and that these parties "*have never claimed or demanded said sums* from either the Multnomah Hotel Company or *The R. R. Thompson Estate Company*, and from the nature of the accounts it might appear that they, or either of them may have a claim against I. Gevurtz & Sons therefor, but that each of said Philip Gevurtz, Alex. Gevurtz and Louis Gevurtz are *estopped from claiming or collecting said demands or accounts from the The R. R. Thompson Estate Company* (italics ours) or the Multnomah Hotel Company, each of them having been directors of I. Gevurtz & Sons at the time of the adoption of the resolutions by I. Gevurtz & Sons ratifying the sale * * * and are estopped by their actions as directors of I. Gevurtz & Sons, and in accepting I. Gevurtz & Sons as liable for said claims *from collecting the same from The R. R. Thompson Estate Company* or the Multnomah Hotel Company." (Italics ours.)

The same language appears in the amended proof

of claim (Transcript, pp. 84, 85), and further in the amended proof of claim filed and which was allowed, of course, in the bankruptcy proceedings as heretofore stated, the following language occurs (see pp. 87 and 88, Transcript), "*That I. Gevurtz & Sons, bankrupt, in assuming the responsibility of The R. R. Thompson Estate Company for the indebtedness of the Multnomah Hotel Company, (Italics ours) and in guaranteeing the same really and in truth and in fact did not increase its indebtedness or liability, as it was in fact already liable and responsible for all of said indebtedness.*"

The solicitude of The R. R. Thompson Estate Company, upon filing this claim in bankruptcy, to have it understood that the Gevurtz's, individually, were estopped from asserting a claim against them by reason of accepting the Gevurtz corporation as liable therefor, and by said Gevurtz corporation "*assuming the responsibility of The R. R. Thompson Estate Company for the indebtedness of the Multnomah Hotel Company*" shows conclusively and beyond contradiction that the *responsibility of The R. R. Thompson Estate Company for the indebtedness of the Multnomah Hotel Company* was recognized by them, else why have I. Gevurtz & Sons assumed *the responsibility of The R. R. Thompson Estate Company?*

If the language of these proofs do not positively, definitely and unequivocally state an assumption of liability for all of the indebtedness, and an admission of responsibility for the same by The R. R. Thompson Estate Company, it is hard to conceive any language that would do so. In fact, it is hard to conceive how one could so stultify one's self in claiming, after having gone on record in such manner, *and after having received dividends by reason of such record*, that there was no assumption.

Moreover, the motive for such an assumption is evident. It was stated in the minutes of meeting of I. Gevurtz & Sons, filed with the claim in bankruptcy as "Exhibit J" (Transcript, p. 109), and in the option filed as "Exhibit G" with said claim (Transcript, pp. 97-8), and was cogently adverted to by the District Judge (Transcript, pp. 35-36). Said Judge Wolverton:

"But, considering the manner in which the transactions were handled, it is manifest that there was an assumption of the entire indebtedness of the Hotel Company. The purpose of the defendant company, and such was the intendment of the agreement of the parties, was to obtain the stock without impairment of its value because of any impending liabilities of the Hotel Company, and when the note of \$35,000 was given, the defendant company retained in its possession the fund arising therefrom, and disbursed it in payment of the creditors of the Hotel Company. None of it was paid directly to I. Gevurtz & Sons. And as to the indemnity, it operated to reimburse the defendant company in the payment of any liabilities of the Hotel Company beyond the aforesaid amount of \$175,000 plus the \$35,000 disbursed by the defendant company. I am impressed that these transactions import by implication an assumption on the part of the defendant company of the liabilities of the Hotel Company, not only up to the amount of \$175,000, but also of all its liabilities beyond that amount."

(b) Brief of the R. R. Thompson Estate Company in Support of Claim.

Still further evidence of assumption is shown by the Brief filed with the Referee in Bankruptcy. In this brief filed by The R. R. Thompson Estate Company in substantiation of the claim (Transcript, p. 116), one of the two positions taken throughout the brief (the other position will be referred to hereafter) was that the debts of Multnomah Hotel Company, as set forth in said claim, had been paid by it, and that I. Gevurtz & Sons had received and retained the fruits and consideration of these payments to creditors (Transcript, pp. 121, 122); and the court's attention is again called to the fact that *amongst the debts upon which the claim was based, for which The R. R. Thompson Estate Company admitted liability, was that of the Weinhard Estate.*

(c) Referee's Order Allowing Claim.

The Order of the Referee (Transcript, pp. 127-9), allowing the claim of The R. R. Thompson Estate Company, filed in the bankruptcy proceedings, incorporates therein the reason for allowing the claim, which reason is specifically stated, that The R. R. Thompson Estate Company agreed to pay the outstanding accounts "*under an agreement with I. Gevurtz & Sons, duly executed, whereby, in addition to said \$35,000 covered by note in question, they would also pay additional bona fide claims that might be outstanding against said hotel, the exact amount of which could not at that time be fixed,*" and

that in pursuance of said agreement accounts were paid to the extent of some \$60,000, and “*for the return of these advances the claim is made and filed.*” (In this connection the court’s attention should be called to the fact that in the brief of The R. R. Thompson Estate Company filed in the bankruptcy proceedings, and in the order allowing the claim in said proceedings, the entire debts set forth in the proof of claim are referred to as having been paid. It is assumed that by this expression was meant that they had been paid by assumption, and the fact is, for example, some \$100,000 which was to be paid to the First National Bank of Portland, Oregon, was not actually paid, but a note of The R. R. Thompson Estate Company given therefor (Transcript, p. 93); and the claim of M. Seller & Company, to the extent of \$10,000 was also paid by note of the Multnomah Hotel Company (Transcript, p. 93); and the claim of Graves Music Company (Transcript, p. 94) was paid by new contract, and so it is assumed that the claim of the Weinhard Estate was paid by the assumption of liability. At any rate, the total amount of the indebtedness is referred to in the brief of counsel and in the order, as having been paid, and The R. R. Thompson Estate Company cannot now object to that construction after having received the benefits thereof.) This phase, however, has already been adverted to.

(d) Dividends Received.

Upon the allowance of the claim filed by The R. R. Thompson Estate Company, which claim included, as heretofore stated, the indebtedness due the Weinhard Estate upon its note here sued upon, *The R. R. Thomp-*

son Estate Company received and accepted the sum of \$13,237.88 in dividends. (Transcript, p. 130), a proper proportion of which was based upon the payment or assumption of the indebtedness due the Weinhard Estate.

It is therefore confidently asserted that not only was there *some evidence of assumption* of the debts of the Multnomah Hotel Company, *but that the evidence thereof was overwhelming*; that not only was the District Court justified in coming to the determination that there was assumption, but any other determination would have been impossible.

Counsel in his brief (p. 8) refers to a paragraph contained in the option of I. Gevurtz & Sons, which states that the advancing of the \$35,000 upon the Gevurtz & Sons note shall not be in acknowledgment of any assumption by the said The R. R. Thompson Estate Company of any further liabilities, nor for the payment of any greater sum for the assets of the Multnomah Hotel Company than represented by the purchase price of the common and preferred stock. The fact is, however, that it was not at the time of the making of the option that the contract of assumption occurred. The option was not the contract. It was upon the taking over of the capital stock and assets of the Multnomah Hotel Company by The R. R. Thompson Estate Company and the delivery to it of the Contract of Indemnity that the contract was *executed* and the agreement consummated. At that time there was an assumption of the indebtedness, and as evidence of that assumption, the court properly took into consideration the condition of the parties at that time, their reason for assumption, if any, and the filing of the proof of claim

thereafter, the language thereof admitting the assumption, and the accepting of the dividends upon the allowance of the claim, which could only have been *honestly* accepted upon the presumption of such assumption.

2. Was the Indebtedness of Multnomah Hotel Company in Excess of \$175,000?

The court, in finding its general verdict in favor of the plaintiff below, could also have reached the conclusion that the debts of the Multnomah Hotel Company did not exceed \$175,000, and if it so concluded, the judgment was proper, even though it should have determined that The R. R. Thompson Estate Company did not assume *all* of the debts of the Multnomah Hotel Company. This was purely a question of fact.

There was such evidence. In the bankruptcy cause of I. Gevurtz & Sons, wherein was filed the claim of The R. R. Thompson Estate Company for the sum of approximately \$60,000, the trustee in bankruptcy therein objected to the claim, and vigorously contested it, upon the ground, among others, "that I. Gevurtz & Sons had no corporate authority under its charter to guarantee the payment of the obligation of the Multnomah Hotel Company" nor "to execute the contract in question guaranteeing the repayment to The R. R. Thompson Estate Company of bills against the Multnomah Hotel Company, agreed to be handled by said estate company" (Order of Referee, Transcript, p. 129).

Whereupon The R. R. Thompson Estate Company filed a brief in support of its claim with the Bankruptcy

Court, arguing and insisting that \$143,000 included in the payments shown in its Proofs of Claim, paid to the First National Bank by it was *not a debt* for which the Multnomah Hotel Company was liable (Transcript, pp. 120-121 and p. 125). On page 121 it is said:

"The note given to the bank (for \$143,000) was a direct obligation of I. Gevurtz & Sons and one for which the Multnomah Hotel Company was not liable, except that it indirectly obtained the benefit of it, but had paid fully for it by the issue of the capital stock to I. Gevurtz & Sons."

Again, in said brief (Transcript, p. 125), counsel for The R. R. Thompson Estate Company, in insisting upon the allowance of the claim, urges:

"In fact, it is a serious question in our minds whether the bank could have held the Multnomah Hotel Company on these notes (notes of \$143,000) inasmuch as they were purely accommodation makers without any consideration whatever."

This argument, then made by The R. R. Thompson Estate Company, was insisted upon for the purpose of showing that the debts of the Multnomah Hotel Company at any rate were \$143,000 less than now claimed, and that even though the contract of indemnity was void or invalid, the \$143,000 was paid in liquidation of the debts of the bankrupt, and should therefore be repaid by them, less proper credit.

This brief was introduced in evidence in the court below by the Weinhard Estate as an admission of the parties against interest, and it is claimed that this admission was sufficient evidence upon which to conclude that the debts did not exceed \$175,000, and that, therefore, The R. R. Thompson Estate Company was

liable to the Weinhard Estate since its debt was, unlike that claimed by and paid to the First National Bank, a debt of the Multnomah Hotel Company.

A similar situation occurred in the case of *Feldman v. McGuire*, 34 Or. 309, opinion by Wolverton, C. J., (then a member of the Oregon Supreme Court). There, there was introduced in evidence answers filed in another suit, which set forth certain indebtednesses. The court there said:

“These answers of defendant, being against his interest, and he being a party to the action, were admissible to establish plaintiff’s cause.

* * *

“In short, the effort was to prove that defendant (McGuire) had assumed and agreed to pay all of Nicolai’s indebtedness, and that all of such legitimate indebtedness did not exceed \$30,000, and, therefore, that the defendant had agreed to pay the plaintiff’s claim or demand against Nicolai. The agreement, if one existed, to pay all of such indebtedness, was known only to defendant and Nicolai, whose interests were adverse to plaintiff’s in the present action, and hence resort was had to indirect testimony to establish the agreement. When properly understood, we think the exhibits were competent, and taken in connection with the testimony of the defendant, had some tendency to establish plaintiff’s case, and were therefore properly admitted.”

If, therefore, we are correct in our position that there was some substantial evidence upon which the court could have found that the indebtedness did not exceed \$175,000, then no matter how incorrect our other positions may be, the District Court should be affirmed,

since it is conceded that The R. R. Thompson Estate Company was responsible for the proper application of \$175,000, at least, to the payment of *creditors* of the Multnomah Hotel Company, and as shown, they have insisted—*when and where it was to their interest to insist*—that \$143,000 of the money applied by them was applied to the payment of a debt which was really not a debt of the Multnomah Hotel Company.

The next point to be discussed, as heretofore outlined, is the *Second Contention* of Plaintiff in Error—that even though it did assume the entire indebtedness of the Multnomah Hotel Company, including the debt due the Weinhard Estate, the Weinhard Estate could not recover in a suit against it, since it was not a party to the contract. This brings us to the consideration of the much mooted question:

B. Can a Third Person, for Whose Benefit a Promise or Contract is Made Between Two Others, Sue Thereon in His Own Name?

As stated in a note to one of the cases cited by Plaintiff in Error in its Brief, namely, *Linneman v. Morass*, 98 Mich. 178; 39 Am. St. Rep. 538, 532 (Note): “The general rule supported by the weight of authority is that a third person, for whose benefit a promise or contract is made between two others, may sue thereon in his own name, whether the contract is parole or written, and though it is made or entered into without his

knowledge and no consideration moves from him," citing, as upholding this doctrine, cases decided by the courts of New York, Wisconsin, Nevada, California, Oregon, Ohio, Kansas, Missouri, Mississippi, Kentucky, Indiana, Texas, Illinois, Nebraska, North Carolina, Colorado, Minnesota and Iowa, and of the United States, including the Supreme Court of the United States.

Section 27, Lord's Oregon Laws, provides as follows:

"Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in section 29, but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract."

and under this section the Oregon cases have universally upheld the enunciated doctrine where the facts justify it.

It is freely admitted that there are many limitations to this rule. As stated in the Points of Law, there are certain requisites which are essential before this rule may be applied in its widest sense. These requisites are stated under Points 3-A and 3-B. However, it is not deemed necessary, at this stage, to do more than to call to the attention of the court the cases of *Hendricks v. Lindsey*, 93 U. S. 143; 23 L. Ed., p. 855, 857, where it is said:

"But the right of a third party to maintain assumpsit on a promise not under seal made to another for his benefit, although much con-

troverted, is now the prevailing rule in this country,"

and *Union Life Ins. Co. v. Hanford*, 143 U. S. 187; 36 L. Ed., 118, and to the leading Oregon decisions of *Feldman v. McGuire*, 34 Or. 309 (55 Pac. 872); *Washburn v. Investment Co.*, 26 Or. 436; *Miles v. Bowers*, 49 Or. 429, 434; *Oregon Mill Co. v. Kirkpatrick*, 66 Or. 21, 24 (133 Pac. 69); *Baker City M. Co. v. Idaho C. P. T. Co.*, 67 Or. 372, 377, since it is *universally accepted* that where one has purchased property of a debtor and in consideration of the purchase has assumed the debt due to a third person, holding the property as a consideration for the assumption, the third person may maintain a suit thereon in his own name and the promisor is liable thereunder.

It is admitted, throughout the brief of counsel, that where a person has received from another some *fund, property* or *thing* in consideration of which he has made a promise or entered into an undertaking with such other, but directly and primarily for the benefit of a third, such third person may maintain an action directly upon such promise or undertaking so made and entered into for his benefit, although not a party to the transaction. This is the language of the Oregon cases and many of the other cases, cited under the Points of Law.

That, in this case, The R. R. Thompson Estate Company received the stock and assets of the Multnomah Hotel Company, is undisputed; it was found by the Referee upon the allowance of the claim of The R. R. Thompson Estate Company in the bankruptcy proceeding of I. Gevurtz & Sons (Transcript, p. 128); it was so admitted in the Brief of The R. R. Thompson Estate Company filed in said proceedings (Transcript,

p. 119) ; it was set forth in the proofs of claim (Transcript, pp. 79 and 83), and in the exhibits attached thereto (Transcript, pp. 96, 97-8, pp. 103-113) ; in fact, not only did they receive the stock and assets of the Multnomah Hotel Company, *but they also received, accepted and hold, dividends in the bankruptcy proceedings, which otherwise would have belonged and could have been claimed by the Weinhard Estate.* Under such circumstances, it seems folly and useless to go into a lengthy discussion of the cases and counsel for Defendants in Error shall not attempt to do so. Cases have been cited in Points of Law, and the time of this court will not be taken up further in that regard, except in due time to discuss the cases cited in the Brief of Counsel for Plaintiff in Error on page 21 of its Brief.

We now come to a discussion of the *Third Contention* of Plaintiff in Error, namely, that the action is not maintainable, since though the contract of assumption were made, under Section 808, Lord's Oregon Laws, subdivision 2, generally known as the Statute of Frauds, there was no memorandum thereof in writing signed by the party to be charged thereby or its agent. We will therefore consider this question under the heading:

C. Statute of Frauds.

(1) The Assumption Agreement Is Not Within the Statute.

It is maintained by Defendants in Error that *where one has purchased property of a debtor and in consid-*

eration of the purchase has assumed a debt due to a third person, the obligation of the purchaser to the third person is not within the statute of frauds.

Cases have been cited under Points of Law, and they will not be further touched upon here, particularly since there were memoranda in writing, signed by the party to be charged thereby, or his agent.

(2) Proof of Claim and Brief Such Memoranda as Required by Statute.

Such a memorandum was the proof of claim filed in the bankruptcy proceedings by The R. R. Thompson Estate Company, and such another memorandum was the brief filed therein.

They were filed by The R. R. Thompson Estate Company, the Proofs being signed by it and the Brief being signed by its attorneys, or agents, Bauer & Green and A. H. McCurtain, and of course, while neither the proof of claim nor the brief may have said in so many words that, "We, The R. R. Thompson Estate Company, do hereby assume all the indebtedness of the Multnomah Hotel Company," yet that is the construction that they placed upon it; that the referee in the bankruptcy proceedings placed upon it, and that is the only construction which could be placed upon it, permitting them honestly to obtain and retain the dividends received in the bankruptcy matter.

It may be pertinent to quote the following language of Thayer, J., of the Supreme Court of Oregon in deciding *Fisk v. Henarie*, 13 Or. 156, 171:

"The writing in such case need not be signed by both parties, * * *. Neither is it necessary that it contain apt words of contract." * * *

"Any language from which the terms indicated could reasonably be implied would be sufficient. * * * The substance, and not the form, will be looked at in such a case. The object and purpose of these letters should be considered. They should be construed in the light of the surrounding circumstances, and the intention of the parties be gathered from their whole contents. * * * An answer in chancery, admitting the terms of an agreement, has frequently been held to take the question out of the statute of frauds. A parol agreement in such case is not illegal, though invalid unless evidenced by a writing. But the writing need not be made at the time. A subsequent acknowledgment of the agreement by a writing signed by the party to be charged, or his authorized agent, will be sufficient. This doctrine is so well settled that authorities need not be cited to support it."

(3) Question Not Reviewable.

Counsel for Plaintiff in Error, as has already been intimated in the early part of this brief, *has not assigned* in the Assignments of Error filed with his petition for writ of error, the holding of the court that evidence of the assumption was inadmissible under Section 808, Lord's Oregon Laws, Subdivision 2, Statute of Frauds, and it is urged that counsel should not now be permitted to take advantage of this position, although, as intimated, clearly this question seems immaterial, since in any phase of the matter, clearly the evidence was admissible.

Let us now clear up certain other debris which appears in the Brief of Plaintiff of Error, and which has no place therein, since the questions suggested are not properly reviewable.

(D) Other Questions Not Reviewable.

Those Specifications of error set forth in the Brief of Plaintiff in Error (pp. 14, 15, Brief) which correspond with the Assignments of Error (Transcript, p. 54-57) are as follows:

The *First* Specification corresponds in part with Assignment of Error I, namely, in that it assigns as error the holding by the court that the complaint stated facts sufficient to constitute a cause of action.

It is set forth in the Brief (and this is the only discussion thereof in the Brief) in substantiation of the claim that the Complaint does not state a cause of action, as follows (Brief, p. 16):

“It appears from the complaint that the agreed consideration to be paid by plaintiff in error to I. Gevurtz & Sons was \$175,000. It further appears from the complaint that the plaintiff in error actually paid, or assumed debts in excess of said sum. Such agreement was void as to the excess of \$175,000, for two reasons, namely, for want of consideration, and because the undertaking to assume debts in excess of \$175,000 was void, because no memorandum of the same was signed by the plaintiff in error, the party to be charged.”

No discussion of this Assignment is necessary, and

none will be attempted, except to call the attention of the court to the fact that the complaint does not anywhere state that there was no memorandum of said agreement of assumption in writing, nor does it so appear therefrom. In fact it does appear in the complaint that in addition to the \$175,000 to be paid as consideration for the capital stock by The R. R. Thompson Estate Company there was a further consideration to assume the debts in excess of that amount, and moreover the second cause of action set forth in the complaint specifically states that the Multnomah Hotel Company did not owe debts in excess of \$175,000.

The *Second* Specification of Error is to the effect that there was error "in the holding by the court that the evidence introduced and received was admissible under Section 808, Lord's Oregon Laws (Subdivision 2)," Statute of Frauds.

There is no such assignment of error, consequently under rules 11 and 24, heretofore referred to, such error not assigned, according to these rules, should not be regarded.

The *Third* Specification of Error is that the court erred in holding "that the evidence introduced and received proved or tended to prove the material allegations of the complaint." There is no such Assignment of Error, unless Assignments of Error II, III, IV, V, VI, VII, VIII and IX, involving the admission of various exhibits, be considered to correspond with that specification.

No reason is given in the specification why error was committed in admitting these exhibits, and it is hard to conceive of adequate reasons that could be given.

However, it is not the province of this court, nor is it the duty of counsel for Defendants in Error to guess possible reasons for *alleged* error, and attention of the court is again respectfully called to Points of Law VI, where is cited the case of *Deering Harvester Co. v. Kelly* (C. C. A., 6th Cir.), 103 Fed. 262 and *Migeon v. Montana C. R. Co.* (C. C. A., 9th Cir.), 77 Fed. 249, 252, the latter of which cases holds that, when a specification of error as to the rejection of evidence states only the subject of the evidence, and does not give its substance and the brief contains no reference to the page of the record showing the ruling as required by rule 24 of the Circuit Court of Appeals for the Ninth Circuit (none is shown in Brief of Plaintiff in Error here), the matter is not properly brought to the attention of the court.

This Court, after quoting rule 24, comments thereon as follows:

“A strict compliance with these provisions would not only be of great advantage to counsel in their arguments, but would materially aid the court and lessen its labors. It is the duty of an appellant to particularly point out the alleged error upon which he relies, and to directly refer the court to the page of the transcript where the alleged erroneous ruling of the court is to be found.”

Attention of the Court in this regard is also called to the opinion of the Court in the case of *Sigafus v. Porter*, 84 Fed. 43.

The *Fourth*, *Fifth* and *Sixth* Specifications of Error and Assignments of Error X, XI and XII correspond, and are to the effect that the court erred in its refusal

to make special findings of fact and conclusions of law. There is no discussion of this phase of the case in the Brief of Plaintiff in Error, and it is assumed that the contention is abandoned. However, we respectfully refer to the statement of the law and authorities cited under Point of Law I. In reference to this subject, the attention of the court is called to the case of *School District No. 11 v. Chapman* (C. C. A., 8th Cir.), 152 Fed. 887, 894, a writ of certiorari in said case being denied by the Supreme Court, 205 U. S. 545; 51 L. Ed. 923; 27 Sup. Ct. 792. The Court said:

“The trial was to the court, without the intervention of a jury, pursuant to a stipulation in writing filed with the clerk, and the finding upon the issues of fact was general. A proposed special finding tendered by the defendant was not adopted, and this is in effect made the subject of review. When the trial is to the court, without the intervention of a jury, whether the finding shall be general or special rests in the discretion of the court in like manner as it rests in its discretion, when the trial is with a jury, to require that the verdict be general or special. The statute (Rev. St. U. S. sec. 649 (U. S. Comp. Stat. 1901, p. 525)) declares that the finding ‘may be either general or special,’ but it does not give to one of the litigants the right to determine which it shall be.”

The *Seventh* Specification of Error is to the effect that the court erred in holding “that there was sufficient evidence to support the complaint, or a judgment.” This specification corresponds with Assignment of Error XIII, and it is under this specification that the questions of law are discussed in this brief and in the Brief of Plaintiff in Error.

There is no Specification of Error in the Brief corresponding with Assignment of Error XIV, which assignment is "that the court erred in not entering judgment for the defendant and against the plaintiff." In addition to the fact that this Assignment is not specified as error in the Brief, the attention of the court is called to the law set forth under Point of Law V and to the case of *Deering Harvester Co. v. Kelly* (C. C. A., 6th Cir.), 103 Fed. 261, already quoted from in the beginning of this brief.

(E) Discussion of Authorities Relied Upon in Brief of Plaintiff in Error.

This now brings us to the discussion of authorities cited and discussed by Plaintiff in Error in its Brief.

Those authorities cited on pages 17 to 19 to the effect that no written memoranda of the assumption was introduced, and that such written memoranda of the assumption was requisite under the statute of frauds before Plaintiff in Error could be held liable under the assumption, if made, will not be noticed here in view of the fact that *none of the cases cited by Plaintiff in Error maintain its contention*, and further since this phase of the matter has already been discussed in full under the head herein of Statute of Frauds.

Authorities cited on page 21 of the Brief of Plaintiff in Error and discussed at length on pages 22 to 34, are to the effect that a third person may not maintain an action upon a contract made by two others, the performance of which will inure to his benefit, but to which he is not a party.

Much reliance is placed by Plaintiff in Error upon the case of *National Bank v. Grand Lodge*, 98 U. S. 123 (Brief, pp. 24-25). In that case it was held that the Grand Lodge, by resolution made a proposition to the Masonic Hall Association, which resolution when accepted "constituted at most only an *executory contract inter partes*," and that "even as between the Association and the Grand Lodge the latter was not bound to pay anything, except so far as stock of the former was delivered or tendered to it. The promise to pay and the promise to deliver the stock were not independent of each other. They were concurrent and dependent. * * Certainly the obligation of the Lodge was made contingent upon the issue of the stock, and the consideration for payment of the debt to the bondholders was the receipt of the stock. But the bondholders can neither deliver it nor tender it; nor can they compel the Hall Association to deliver it. If they can sue upon the contract and enforce payment by the Grand Lodge of the bonds, the contract is wholly changed, and the Lodge is compelled to pay, whether it gets the stock or not." It will be seen therefore that the agreement in this case was executory. The Supreme Court, in the preliminary discussion of the phase, suggested certain rules of law with regard to a suit by a party upon a contract to which it was not privy.

That the contract there was executory is stated pointedly in the case of *Pope v. Porter* (U. S. Cir. Ct. Iowa), 33 Fed. 7, 9, opinion by Shiras, J., where it is said:

"In the other case cited (*Bank v. Grand Lodge*, 98 U. S. 123) it was held that the promise made by defendant was concurrent with and dependent upon the contract of the other party, and, being an *executory contract*

[italics ours] between the immediate parties thereto, a third party could not sue thereon, without, in effect, changing the meaning of the contract."

This distinction is also clearly made in the case of *In re Halstead Co.*, 204 Fed. 115, 118, where it is said:

"It has already been stated that this agreement was transitory, or, as styled by the Supreme Court of the United States in a somewhat similar case 'an executory contract inter partes.' *National Bank v. Grand Lodge*, 98 U. S. 123, 25 L. Ed. 75."

And so in the case of *Washburn v. Investment Co.*, 26 Or. 436, 442, opinion by Judge Bean (now a member of the Federal Judiciary), where it is said:

"After a somewhat exhaustive examination of the question we have found no case which has gone so far as to hold that such an action may be maintained on an *executory contract*," [italics ours]

quoting *Second National Bank v. Grand Lodge*, 98 U. S. 123. In the case of *Washburn v. Investment Co.*, 26 Or. 436, the court, on pp. 443 and 444, refers to the contract there in question as follows:

"It was, in effect, an agreement by the defendant to advance to the leather company money with which to pay its debts, and take in satisfaction thereof its stock. If such a contract can be enforced by the plaintiff, then every contract by which one person promises or agrees with another, for a consideration

moving from him, to advance money to pay his debts, can be enforced by the parties whose debts were thus to be paid. We do not understand any case to have gone to that extent. If the capital stock referred to in the contract *had been in fact sold and transferred* to the defendant, and in part consideration therefor it had agreed and promised to pay plaintiff's claim against the leather company, the case would have been within the principle of *Baker v. Eglin* and similar cases, as we understand it." [Italics ours.]

The latter language of Judge Bean in that case to the effect that *if the capital stock had been in fact sold and transferred* to the defendant, an action could have been maintained, differentiates the Washburn case and the Grand Lodge from the case at bar. *Here the stock and assets were transferred and delivered*, and the contract was executed.

For some reason or other Plaintiff in Error refuses to see this distinction.

A similar distinction is made in the case of *Brower Lbr. Co. v. Miller*, 28 Or. 565, 572, opinion by Wolverton, J. (then a member of the Oregon Supreme Court and the learned judge below who decided the case at bar). The court there said, on page 572 of its opinion, "*The contract with the city is executory in its nature.*"

And so in the opinion by Judge Wolverton in the case at bar the same distinction is made. Said Judge Wolverton, in rendering the opinion in this case (Transcript, pp. 33, 36-37) :

"It is very true, as counsel for defendant contends, that where there is only an executory

contract entered into between two parties, whereby one of the parties for a consideration moving from the other agrees to pay the debt of a third, the third party has no right of action against the promisor. *Washburn v. Investment Company*, 26 Or. 436; *Brower Lumber Co. v. Miller*, 28 Or. 565.

“But it is settled law now in this state that, where a person has received from another some fund, property or thing, in consideration of which he has made a promise or entered into an undertaking with such other, but primarily and directly for the benefit of a third, such third party may maintain an action directly upon such promise or undertaking so made and entered into for his benefit, although not a party to the transaction.

“‘In such case,’ as was said in *Feldman v. McGuire*, 34 Or. 309, ‘the third party acquires an equitable interest in the property, fund, or thing; and the law, acting upon the relationship of the parties and their treatment of the fund, establishes the requisite privity, creates a duty, and implies a promise which will support the action.’

“The doctrine has been treated of as well in the two cases first above cited, and in *Parker v. Jeffery*, 26 Or. 186, and *Kiernan v. Kratz*, 42 Or. 474, and there has been no modification of it that I am aware of in recent years.

“Applying the principle here, there was in legal intendment a fund created and left in the hands of the defendant company for the payment of all the liabilities of the Hotel Company, and for that reason the defendant company was rendered liable directly to all the creditors of the Hotel Company, including the plaintiffs.”

Adverting again to the case of *National Bank v. Grand Lodge*, 98 U. S. 123, the interpretation placed by the courts upon the observations made by the Supreme Court in that case is to the effect that, if the state law gave a right of action at law to a third party for whose benefit a contract was made by two others, then the third party could sue thereon, but if in the state where the cause arose a suit was maintainable only in equity, an action at law could not be instituted, but the suit would have to be in equity in the name of the party who made the contract, the reason being that if privity be lacking, the proceeding must be in equity, unless the laws of the state give the right to sue at law. See *Everett v. Independent School Dist.*, 109 Fed. 677, 701. Such is the interpretation given that case in the cases of *Keller v. Ashford*, 33 L. Ed. 667, 133 U. S. 610; *Willard v. Wood*, 34 L. Ed. 211, 133 U. S. 309; *Johns v. Wilson*, 180 U. S. 446, 21 Sup. Ct. 445; *Jessup v. Illinois C. Ry.*, 43 Fed. 489, 493, opinion by Mr. Justice Harlan; *Everett v. Independent School Dist.*, 109 Fed. 697, 701; *Fairfield v. Rural Independent School Dist.*, 111 Fed. 108, 110; *Good-year Shoe Co. v. Dancel*, 119 Fed. 692, 695; *Central Elec. Co. v. Sprague*, 120 Fed. 925, 926; *Barker v. Pullman Car Co.*, 124 Fed. 555, 566-8; *Quigley v. Spencer Stone Co.* (C. C. A. 7th Cir.), 143 Fed. 86, 90; *Gray v. Grand Trunk West. Ry. Co.*, 156 Fed. 736, 741-5; *Gibson v. Victor Talking Machine Co.*, 232 Fed. 225, 228.

This distinction is also set forth in the case of *Union Mutual Ins. Co. v. Hanford*, 143 U. S. 187, 36 L. Ed. 118, decision by Mr. Justice Gray, although in that case the Grand Lodge case is not cited.

The next case discussed by Plaintiff in Error (Brief, p. 25) is that of *Pennsylvania Steel Co. v. N. Y. City Railway Co.*, 198 Fed. 721, 749. The case is not really discussed, but merely quoted from, and there is certainly no objection to the quotation nor to the decision, and it is clearly in line with that contended for by the Defendants in Error, only the quotation might have been begun a few lines earlier in the decision, where it is said:

“There is no real and substantial reason, why, if the parties to a contract recognize the interest of a third person and desire and intend to give him a right of action upon it, they should not be able to do so. And the prevailing doctrine in this country is contrary to the English rule.”

Plaintiff in Error here begins quoting from the opinion, as follows:

“It is generally held, subject to qualifications, that a third person may sue upon a promise made to another for his benefit. Sometimes the right is based by the courts upon provisions in codes giving the ‘real party in interest’ the right to prosecute suits. Sometimes it is based upon the theory of a trust; the promisor being regarded as trustee for the third party. Sometimes it is based upon the theory of agency; the promisee in the contract being considered the agent of the third party, who adopts his acts in suing upon the contract. But whatever may be the correct theory, one thing is essential to the right and that is that the third person be the real promisee. It is not enough that the contract may operate to his benefit. It must appear that the parties intend to recognize him as the primary party in interest and as privy to the promise.”

In the case at bar, certainly the Weinhard Estate, as one of a class, to-wit, creditors of the Multnomah Hotel Company, was recognized, and was within the language of the quotation of Plaintiff in Error. The parties had in mind and intended that the creditors of the Multnomah Hotel Company should receive the benefit of the agreement between them. Not only was this true, but *The R. R. Thompson Estate Company received money in the form of dividends to which the Weinhard Estate was entitled, and it should be here added that in this case, not only was the Weinhard Estate intended to be benefited by the parties, but The R. R. Thompson Estate Company actually received a consideration, to-wit, dividends, which in fact belonged to the Weinhard Estate, and there was really and in fact actual privity between them.*

On page 27 of its brief, counsel for Plaintiff in Error refers to the note in the case of *Linneman v. Moross*, 39 Am. St. Rep. 531. We have already quoted from that note, and further attention need not be given to it.

On the same page of its brief counsel cites the case of *Davis v. Dunn*, 121 Mo. App. 493, saying, "We have found *one case* expressly holding with our contention in the case at bar."

An expression of jubilation on the part of counsel for Plaintiff in Error is lightly veiled behind those words: "Eureka! It has been found! One case has been discovered expressly in point!" exclaims counsel, as it were. But, alas! even this solace cannot be accorded to counsel for Plaintiff in Error.

The facts in that case are thus given by counsel in its brief, on page 27:

“It was admitted that the buyer of a stock of merchandise had agreed to pay 80 per cent of the value of the said stock, and out of the purchase price to pay items of indebtedness due from the tenant (the seller), including a claim for rent; and it was held that when the buyer had paid debts of the tenant to the amount of more than the value of the goods without paying the rent, he was not liable for the rent claimed, although it was found that the promise of the buyer for the benefit of the landlord *was an unconditional promise.*” [Italics ours.]

On the contrary, the language of the court is: “Their written promise to Collins for plaintiff’s benefit WAS NOT AN UNCONDITIONAL PROMISE.”

For the purpose of calling the court’s attention to the distortion placed by Plaintiff in Error upon that case, this opinion will now be set forth, since it is a typical treatment of the cases by Plaintiff in Error repeatedly throughout its brief.

Said the court in that case:

“Plaintiff brought this action for rent alleged to be due him for a store building in the town of Wheeling. He prevailed in the trial court. It appears that plaintiff owned a building which he had rented to James Collins who left therein a stock of merchandise. There was due to plaintiff from Collins, as rent, the sum of \$192.50 when Collins sold his stock to these defendants, the sale being evidenced by a written contract in which the defendant agreed to pay eighty per cent of the cost of the goods, furniture and fixtures (to be ascertained by an invoice) and which contained an additional provision that defendants should ‘out of the proceeds and purchase price of said goods

pay' several specified items of the indebtedness owing by Collins to different persons, the last of which items was the rent for which this action is brought. The evidence showed that these defendants paid and discharged enough of Collins' debts as specified in the contract to amount to more than the goods as invoiced, and they therefore refused to pay the plaintiff.

"If we measure the liability of these defendants by the contract between them and Collins, we find there is no ground upon which plaintiff can stand to enforce payment of his rent from these defendants. Their written promise to Collins, for plaintiff's benefit, *was not an unconditional promise*. They were to pay the rent out of and as a part of the purchase price of the goods to be ascertained by invoice. They did pay the debts of Collins on such purchase price until nothing more was due thereon, and they were not liable for anything further. The case so considered is controlled by that of *Raethel v. Smith*, 68 Mo. 258."

Dunning v. Leavitt, 85 N. Y. 30, is next discussed by Plaintiff in Error in its brief, page 27. The facts were: The property was conveyed by grantor to grantee, who assumed to pay the mortgaged indebtedness. The title to the property was defective and the grantee was evicted by another having paramount title. The mortgagee sued the grantee on the promise to assume the mortgage made to the grantor, and the court upholds the general doctrine contended for, but says, as quoted in Brief of Plaintiff in Error:

"I know of no authority to support the proposition that a person not a party to the promise, but for whose benefit the promise is

made, can maintain an action to enforce the promise where the promise is void as between the promisor and promisee for fraud, or want of consideration, or failure of consideration."

In other words, there was no consideration moving from the grantor to the grantee. There was no valid contract between the original parties based on a consideration, upon which a third party could sue.

On page 28 of its Brief, Plaintiff in Error discussing the case of *First Bank of Sing Sing v. Chalmers*, 39 Hun. 475, says, "The defendant had taken over from his debtor a stock of merchandise in payment of his account, and had promised to pay certain claims owed by his debtor to third parties, including the plaintiff," and then quotes from the case.

As a matter of fact, *the defendant did not take over from his debtor a stock of merchandise, or any other property*. The court, in its opinion, definitely states as follows:

"They (defendants) received nothing from Spruce & Leary (debtors). They neither obtained possession nor obtained title to any property from Spruce & Leary for which they were under obligation to pay them, or in any manner which created the relation of debtor and creditor between them. They never owed Spruce & Leary any money for anything. Of course the purchase of manufactured goods is excluded from this view; what is intended is that the defendants neither *at the time of the execution of the confession of judgment, nor at any subsequent time, received property from Spruce & Leary for which they were bound to pay as between them.*" (Italics ours.)

The facts of this case, as stated by Plaintiff in Error, are not the facts, and the language quoted by them is highly misleading, to say the least, as is clearly shown by the extract above given.

The next case discussed by Plaintiff in Error in its Brief, p. 28, is the case of *Jefferson v. Asch et als.*, 53 Minn. 447, with which case we have no quarrel. The facts were as follows: George Benz was the lessor of certain property to Smith & Company. Smith & Company entered into a contract with a contractor to make certain alterations and repairs, and the contractor as principal and Asch and another as sureties gave a bond to pay all just claims for all work and material, etc. The plaintiff, having furnished materials to the contractor, brought this action on the bond against Asch, the contractor and the other obligor. The court said (p. 449):

“As, so far as it appears by the complaint, Benz (the promisee) could not be liable to pay for the work done and materials furnished in fulfilling the contract to repair, and as, under the law then in force, his interests in the property could not be subject to a lien therefor, it was legally a matter of indifference to him whether the work and materials were paid for or not. He had no duty in respect to it. And the question comes to this: Where in a contract between two persons one promises the other to do something for the benefit of a stranger to the contract, and the promisee has no relation to the thing to be done nor to the stranger to be benefited, can such stranger bring an action to enforce the promise? * * *

“Without undertaking to lay down a general rule defining when a stranger to a promise between others may sue to enforce it, we are

prepared to say that, where there is nothing but the promise, no consideration from such stranger, *and no duty or obligation to him on the part of the promisee*, he cannot sue upon it. Such is this case." (Italics ours.)

Nor have we any quarrel with the case of *Hargadine v. Swofford*, 65 Kan. 572, 70 Pac. 582. The case is not a similar case to the one at bar. We quote the head note of that decision, so the court may see the extent thereof:

*"Assumption of Defendant—Fraudulent Inducement—*A creditor who claims the benefit of a contract made by another with the debtor, to pay the latter's debt will be bound by the equities between the contracting parties growing out of the agreement, and he cannot enforce the promise if the promisor was fraudulently induced to make it.

*Rescission & Restoration—*One who refuses to be bound by an agreement which he was fraudulently induced to make, will not be required to restore anything which he did not receive as a consideration for his engagement."

The case of *Ellis v. Harrison*, 194 Mo. 269, 276, is discussed on page 29 of the Brief. The facts in this case are: Ellis Sr. and Ellis Jr., father and son, were partners, conducting a tobacco jobbing business. Ellis Sr. retired from the firm, and sold out to Ellis Jr., taking his notes for the purchase price. Subsequently Harrison became a partner with Ellis Jr. and by virtue of the partnership agreement agreed to assume the "mercantile debts" of the "jobbing business." The court said (p. 278):

“If the parties when it (the partnership agreement of Ellis Jr., with Harrison) was made, understood and intended the expression ‘mercantile debts’ (as used therein) to exclude the notes in question (the subject of the action) the plaintiff, cannot enlarge its meaning for them. They were the contracting parties. It is their contract to be enforced, and plaintiff has no such relation to the subject as permits him to assert the contract different from what they mutually agreed it should be.”

It will be seen, therefore, that what the court held, and all it held, was *that there was no contract to assume the particular debt*.

The case of *Raethel v. Smith*, 68 Mo. 258, is next discussed by Plaintiff in Error in its Brief (p. 29), where Plaintiff in Error says:

“The defendant purchased a certain lot of bricks which it was believed would be sufficient to enable him to pay off two mortgages against the same. He paid a certain portion to the seller, at which time it was discovered that there were not sufficient bricks under the contract price to pay both mortgages. He paid the first mortgage, and it was held in an action brought by the second mortgagee to compel satisfaction of his claim from the transaction, that the purchaser, having in good faith responded to the extent of the fund in his hands, was not liable on his promise to pay the debt.”

No comment need be made to this misstatement, except to quote the opinion of the court. Said the court:

"In May, 1875, Bollman sold the defendants a pile of bricks, which he estimated to contain 40,000 to 50,000 bricks, at \$8.00 a thousand. He informed the defendants at the time that there was two mortgages on the bricks, one to Owen for \$192, and the other to plaintiff for \$46. It was, therefore, agreed that defendants should pay \$80 to Bollman and the balance to go in payments to Owen and plaintiff on the mortgages. It turned out there was only 34,000 bricks and had there been 40,000 as estimated, the price at \$8.00 per thousand would have paid off both mortgages. As it was, after paying \$80 to Bollman, which was agreed to be paid in advance, the defendants paid the balance to Owen who had the first mortgage, and the plaintiff now insists on holding the defendants on the assumption that their contract was unconditionally to pay his mortgage for \$46. *No such contract was proved*, and the judgment for the defendants was in our opinion correct." (Italics ours.)

The next case cited by Plaintiff in Error (Brief, p. 30) is the case of *McArthur v. Dryden*, 6 N. D. 438, 442-3. There is no such quotation in the opinion that "the statute presupposes a valid contract between the parties that rests upon a *sufficient consideration*." Plaintiff in Error is quoting from the head notes. The court said in its opinion, to which there is no objection:

"Section 3840, above quoted ('a contract made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto received it') contemplates a contract resting upon a present consideration passing between the two contracting parties, and with which the third party has no connection. * * * In the case at bar, as

we have seen, Dryden never received *any* consideration to support an individual promise."

In this case it will be seen that there was never any contract to assume, because a contract must be based upon a consideration.

In the case of *Parker v. Jeffery*, 26 Or. 189, discussed by Plaintiff in Error in its Brief on page 30, the court held that a bond given by certain contractors to the city to hold the city harmless from any loss or damage, one condition of which was that if they should pay all sums of money due at the completion of the work, or for material used in, and labor performed in connection with said work, the bond should be null and void, and the court said:

"* * * Plaintiffs cannot maintain this action, because *there was no promise by Jeffery & Bays* (defendants) *to pay for labor and material used by Robertson Brothers* (plaintiff's assignor) in the performance of their contract with the city, nor was the bond taken by the city for the benefit of parties who might furnish such labor or material, but to indemnify and save it harmless from loss or damage by the failure of Robertson Brothers to perform their contract. The obligation of Jeffery & Bays is measured by the terms of their contract, * * *. The bond contains no covenant or agreement to pay the plaintiffs, or to see them paid, but only a condition, the performance of which will exonerate them from liability, and *such a condition will not be construed as a promise.*" (Italics ours.)

The case of *Washburn v. Investment Co.*, 26 Or.

436, discussed by Plaintiff in Error in its Brief (p. 31), has already been adverted to, and as has already been said, *the contract was executory* and the court particularly stated that, if instead of an agreement to purchase the stock there had been an actual transfer of the capital stock, the third party could have recovered on the contract. Such a case as that predicated by the court is the case at bar.

Likewise the case of *Brower Lbr. Co. v. Miller*, 28 Or. 570, discussed by Plaintiff in Error in its Brief (p. 33), has also been heretofore discussed by us. That case, decided by District Judge Wolverton, when on the bench of the Supreme Court of Oregon, correctly follows the decision of *Parker v. Jeffery*, 26 Or. 189.

The case of *Feldman v. McGuire*, 34 Or. 309, is discussed on page 34 of the Brief of Plaintiff in Error. It also was decided by District Judge Wolverton (while a member of the Oregon Supreme Court, than whom, with his associate on the District Bench, also formerly a member of the Oregon Supreme Court, none are better qualified to pass upon the law of Oregon). That case is very similar to the case at bar in many phases. There a suit was brought by Mrs. Feldman to recover from one McGuire. It seems that Nicolai, the promisor, had conveyed to McGuire all of his real property. Mrs. Feldman obtained a judgment, and endeavored, in a former suit, to have the conveyance to McGuire set aside on the grounds of fraud, but the defense interposed by McGuire was that the property had been conveyed to him in consideration of the assumption of the debts of Nicolai, and the conveyance was held not to be fraudulent. Thereupon Mrs. Feldman brought a suit to recover against McGuire upon the promise of Mc-

Guire to pay the debts of Nicolai, asserting that she was one of the creditors of Nicolai. McGuire denied this, and asserted that the debts which he assumed were to the extent of \$30,000, and that her debt was not among them. The court admitted certain answers filed in the other suit, which tended to show that the entire debts of Nicolai did not exceed \$30,000, and that therefore Mrs. Feldman's debt was not included. The statute of frauds was also pleaded in that case, as in this, although in that case there was no pretense of a written memorandum. The court held, very properly, that there was an assumption of the debts; that Mrs. Feldman, the third party, could sue upon the contract and assert that such contract was for her benefit and that it was not within the statute of frauds.

In this connection the attention of the court is called to the case of *Barker v. Pullman Car Co.*, 124 Fed. 555, 568. In that case, referring to the question as to whether the intention to benefit the third party was sufficiently in the minds of the parties to the contract, to enable the third party to sue thereon, it is said:

"It is clear that the creditors, etc., of the Wagner Company were incidentally intended to be benefited; but it is equally clear that the benefit of the two companies was equally intended—especially the benefit of the Wagner Company—and to relieve it from the delays incident to a payment and settlement of its obligation before a transfer of the property. In fact, this is the declared purpose and object of the assumption of these liabilities. It is not so clear that the object of this clause of the agreement was the benefit of these creditors of the Wagner Company at all, or that their interests were in the minds of the contracting parties. The property of the Wagner

Company was not transferred to secure their payment, nor did they have a lien thereon. Still their interests and their benefit must have been in the minds of the contracting parties to some extent. Do the authorities go to the extent of holding that the benefit of these creditors, etc., of the Wagner Company, must have been the sole object of the agreement, or of the clause in question? The question is not free of doubt, but this court is of the opinion that it was not necessary to name the creditors, etc., of the Wagner Company, or specify their respective claims, their nature and amount, or that the benefit of such creditors should have been the sole object of this clause of the agreement."

The court concludes that the contract was made for their benefit.

Likewise in the case of *Moore v. First Natl. Bank of Ouray*, (Col.), 88 Pac. 385; 10 L. R. A. (N. S.) 260, 263, where it is said:

"It further charges that, in consideration for a transfer to them by the bank of all its assets, McClure and others assumed and agreed to pay all its liabilities, aggregating about the sum of \$41,000. Facts are alleged in the pleading from which it necessarily follows that the note sued on is one of the liabilities of the bank, and that the individual defendants agreed to pay all its liabilities. *The complaint clearly brings the plaintiff within the class for whose use and benefit the contract was directly made.* State v. St. Louis & S. F. R. Co., 125 Mo. 596, 28 S. W. 1074; Rohman v. Gaiser, 53 Neb. 474, 73 N. W. 923; Lehow v. Simonton, 3 Colo. 346; Green v. Richardson, 4 Colo. 584; Green v. Morrison, 5 Colo. 18. The

estimate of the sum of the liabilities at \$41,000 does not limit to that sum the liabilities which the individual defendants assumed." (*Italics ours.*)

However, in the case at bar, the facts are stronger, far stronger, than those found in any contested case which we have been able to discover, and it is confidently asserted that, not only must the Weinhard Estate in this case be assumed to have been one of the parties intended to be benefited by the assumption agreement, but the claim that it was not is presumptuous, especially since the Plaintiff in Error has obtained money, which otherwise the Weinhard Estate should have been entitled to. *Under what possible theory could The R. R. Thompson Estate Company have filed its claim in bankruptcy and obtained dividends therein upon the indebtedness due the Weinhard Estate if they had not assumed it, and if the Weinhard Estate had not been intended to be benefited by this assumption?* The Brief of counsel for Plaintiff in Error is silent on that subject, and no such theory was advanced below.

G. Conclusion.

In conclusion it may be said that throughout this brief counsel have endeavored to dispassionately and logically present their case and to discuss the questions involved, but it is hard to view with dispassion the assumed righteous remarks of indignation of Plaintiff in Error contained in the last few pages of its brief.

Plaintiff in Error, on page 29 of its brief, states that it cannot conceive of a greater hardship than to re-

quire them to pay the claim of the Weinhard Estate, and proceeds to set forth the amount of money which it claims it lost by reason of the transaction, and intimates that if matters were allowed to remain as they were prior to the institution of this action, the Weinhard Estate would lose only the difference between \$6,000 and \$2,500, the amount of the note, less the payments thereon, by the Multnomah Hotel Company, whereas it has lost, so they claim, some \$43,000 in the transaction.

At last, then, reduced to its final analysis, we have some theory upon which Plaintiff in Error seeks to base its contention, namely, that since it lost heavily through the transaction, others should likewise suffer loss, and therefore insists that Defendants in Error, the Weinhard Estate, have not only no legal claim against it, but no claim of a moral or equitable nature, and that the rights of Defendants in Error are "*thinner than the memories of a forgotten dream.*"

It is difficult to perceive the mental attitude of Plaintiff in Error, or its counsel, or the causes which induces it, that would effect such a weakening of the moral sense, even though it be in a dream, or the memories of one.

In answer to this delirium of indignation, which seems to possess counsel (and, knowing personally the standing and integrity of counsel, we prefer to believe it is assumed), it may be said, that The R. R. Thompson Estate Company received what it bargained to receive; it agreed to pay and assume the indebtedness of the Multnomah Hotel Company, amongst which was the notes due the Weinhard Estate. On the basis of this assumption, it received money, which it could only have received upon the claim that it had purchased or as-

sumed the obligation of the Weinhard Estate against the Multnomah Hotel Company.

Sometimes it hurts to abide by the terms of a contract which may have proven disastrous; sometimes it hurts to pay a debt upon which it is felt that no sufficient benefit has been received; sometimes it hurts to take a just loss gracefully, but honest men do these things, and courts enforce such contracts.

Respectfully submitted,

JULIUS SILVERSTONE,

TEISER & SMITH,

Attorneys for Defendants in Error.



